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Table of contents

Research Articles

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Research Article

RESTRICTIONS FOR REMOTE WORK OF IT SPECIALISTS LIVING ABROAD: EXPERIENCE AND CHALLENGES OF EAEU MEMBER STATES

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In the context of sanctions pressure on Russia the issues of import substitution in the field of digital technologies are getting even more urgent. Highly qualified specialists with respective competencies are in short demand in the country. The government take some measures to that end, but they can solve all the problems. Engagement of required specialists from abroad – those working on a remote basis – could improve the situation. However, there are certain unresolved issues in the labor legislation of the Russian Federation and some other countries, including members of international economic integration organizations such as the Eurasian Economic Union that hinder this process. Identification of hindrances and restrictions preventing free movement of human resources in EAEU member states and efficient use of remote work in the field of IT is what this paper is dedicated to. To that end the actual situation unfolding in the labor market of the field of IT on the territory of EAEU member states has been analyzed, and so has been labor and other legislation of member states regulating the labor of remote workers and the academic literature and papers published in the periodicals. The system analysis and comprehensive review of sources and comparative legal studies have become the main methods of research. As a result, legal and organizational restrictions preventing efficient application of remote work of IT specialists typical for some or even all EAEU member states have been identified. Also, there have been suggested some ways to overcome the identified restrictions that can be implemented by adopting new legal provisions or by amending the existing ones.

Key words: *remote work, IT specialists, foreign workers, wage, labor safety, conflict rules*

Introduction

Legal uncertainty, gaps and contradictions of legal regulation of certain labor contract types and atypical types of employment create some restrictions for the labor market that affect development of the import substitution. For example, engagement of IT specialists, software developers from among foreign citizens and the Russian citizens residing abroad can be arranged on a remote basis, but it faces the problems that need to be solved through introduction of amendments into the labor, tax and financial legislation.

Nowadays, there is an obvious deficit of IT specialists in Russia. According to the data of the research conducted by the Information & Computer Technologies Industry Association (APKIT) upon the request of the Ministry of Communications of the Russian Federation, the demand for these employees nowadays amounts to more than 200,000 people and it will continue growing to reach 300,000 by 2024[1]. And, though

[1] IT Staff for Digital Economy in Russia. Universal Estimate of IT Specialists in Russia and a Forecast of a Need for Them until 2024. Available at: https://apkit.ru/files/it-personnel%20research_2024_APKIT.pdf [Accessed: 15 September 2022].

in early 2022, the number of IT vacancies was reduced by a quarter, there is still a deficit of specialists. As for the changes of supply and demand, they stem from the fact that, firstly, non-core organizations reduced their digitalization program, and, secondly, the specialists started to look for the companies that would remain stable in the face of sanctions risks[2].

According to the data of the Russian Association for Electronic Communications (RAEC), about 50–70 thousand IT specialists have left Russia in the context of a special military operation. The Association has also forecasted the second wave of 'relocations' of about 70–100 thousand people[3]. However, in the end of May, Prime Minister M. Mishustin stated that 85% of those previously gone returned to the country[4]. In the middle of summer the 'drain' in the field of IT reduced, according to the official data, and the most pessimistic forecasts did not ultimately come to fruition: 20,000 left the country instead of expected 170,000[5].

Despite a deescalation of the specialist outflow and a reduced number of vacancies, the personnel deficiency remains quite an acute problem. As it is known, specialists in the field of digitalization are required to ensure the programs of economic development and import substitution.

To stabilize the situation and prevent IT specialists from leaving the country, the public authorities of the Russian Federation took a whole series of measures. These include introduction of a preferential rate for credits for certified organizations (to give the businessmen an incentive in the field in question); a 3% mortgage rate for IT specialists; financing grants for software created by the national developers[6]; establishment of a deferment from the draft for the persons eligible for military service if they have a respective higher education[7].

A simplified procedure was established for the international IT specialists to get a residence permit. To that end, in June 2022, the changes were introduced to the Federal Law 'On Legal Status of Foreign Citizens and Individuals without Citizenship in the Russian Federation'[8].

The Republic of Belarus faced the so-called relocation of IT specialists even earlier than the Russian Federation – in 2020, due to well-known political events (Tomashevsky, 2021a).

Other EAEU member states also, on the one hand, suffer from a deficit of highly qualified specialists in the field of IT and, on the other hand, due to several well-known reasons become the places of residence for these specialists while they keep working for the employers from abroad. So, even entering the country they do not become formal labor migrants. For example, in September 2022, the Minister of Economy of the Republic of Armenia reported that 50–70 thousand IT specialists from Russia had arrived at Armenia[9]. IT specialists from Russia and Belarus move to Kazakhstan[10]. However, some are looking for a job in a new country, some arrive to work in a new (for the country of stay) company founded with the foreign capital or in a branch of a foreign company, while others continue working for the same employer remotely.

A Catastrophic Deficit. A Digital Breakthrough is Predicted to Suffer from an Acute Shortage of IT Specialists. Available at: https://www.dp.ru/a/2020/01/24/Katastroficheskij_deficit [Accessed: 10 September 2022].

[2] A Sudden Drop in Demand for IT Specialists in Russia. The Number of CVs Rising, The Number of Vacancies Falls. Available at: https://www.cnews.ru/news/top/2022-09-05_chislo_it-rezyume_rastetinteres [Accessed: 10 September 2022].

[3] RAEC forecasted the departure of up to 100,000 IT specialists in April. RBC, March 22, 2022. Available at: https://www.rbc.ru/politics/22/03/2022/6239c48b9a7947da733b01fd [Accessed: 10 September 2022].

[4] Mishustin Reported On the Return of 85% IT Specialists Previously Gone Abroad. RBC, May 27, 2022. Available at: https://www.rbc.ru/society/27/05/2022/6290b8009a7947311d9f42c7 [Accessed: 10 September 2022].

[5] IT Staff for Digital Economy in Russia. Universal Estimate of IT Specialists in Russia and a Forecast of a Need for Them until 2024.

[6] Executive Order of the Government of the Russian Federation No. 714-r dated April 1, 2022 'On Allocation of Budgetary Appropriations from the Reserve Funds of the Government of the RF in 2022 due to Restrictive Measures Taken by Foreign Countries Toward the Russian Federation'.

[7] Resolution of the Government of the Russian Federation No. 490 dated March 28, 2022, 'On Approval of the Rules for Entitlement to Get a Deferment from the Draft for the Citizens of the Russian Federation working in the certified organizations operating in the field of information technologies'.

[8] Federal Law No. 207-FZ 'On Amending the Federal Law on the Legal Status of Foreign Citizens in the Russian Federation' dated June 28, 2022.

[9] Armenia Hosted Over 50,000 IT Specialists from Russia. Available at: https://rtvi.com/news/armeniya-prinyala-svyshe-50-tysyach-it-speczialistov-iz-rossii/ [Accessed: 10 October 2022].

[10] IT Guys from Russia and Belarus Shared Why They Chose Kazakhstan. Available at: https://tengrinews.kz/article/aytishniki-rossii-belarusi-rasskazali-pochemu-vyibrali-1764/ [Accessed: 10 October 2022].

One would think, the labor transfer, including highly qualified work force, between the countries belonging within the same international regional economic integration organization – EAEU – shall not face ant serious challenges. However, a lack of synchronized labor, social welfare, tax, and currency legislations can result in certain hindrances and restrictions. This paper covers the restrictions imposed on remote employees working from abroad. The legal regulation of remote work has been recently researched by such scientists from EAEU member states as S. Yu. Golovina, M. K. Zhuranova, K. S. Ramankulov, K. L. Tomashevsky, S. V. Shuraleva and others. Most scientists have analyzed the system of remote work legal regulation in certain EAEU countries (Zhuranova, 2012; Shuraleva, 2019) and conducted a critical analysis of the changes in this regulation that had been caused by the pandemic (Golovina, 2020; Yeremina, 2020). Some papers have been dedicated to a rather-legal analysis of labor legislation regulating the remote work in EAEU member states (Shuraleva, 2019), including its application to the 'digital nomads' (Tomashevsky, 2021a). However, the possibility for IT specialists to work from abroad has never been examined in the aforementioned papers one way or another. Solely, we had already made an attempt to research the ambiguous practice of using the remote work from abroad in the Russian Federation, even before the situation with our country facing serious economic restrictions in 2022 has come about and without any consideration to the specificities of the work of IT specialists (Zaitseva & Abakumova, 2021). This paper includes the assessment of formal opportunities for IT specialists to use working from abroad while they reside on the territory of one EAEU member state and work for the employer from another EAEU member state. To that end, the labor legislations of EAEU member states are analyzed in order to identify the conditions for such a work and the circumstances that restrict it. Also, regulatory impediments for free development of remote work within EAEU are discovered and potential ways to deal with them are suggested.

Materials and Methods

To accomplish this goal and the established objectives, the labor, social welfare, and tax legislations of EAEU member states are analyzed to the extent that they regulate the labor activities of remote workers residing abroad. The standpoints of legal scholars on the problem under study and the periodical press materials are examined, since the relations in the field in question are dynamically changing nowadays showing a high level of transformation. Therefore, the main research methods are system analysis and comprehensive review of normative legal acts of the Russian Federation, the Republic of Belarus, the Republic of Kazakhstan, the Republic of Armenia and the Republic of Kyrgyzstan; a comparative method and a Delphi approach. The conclusions based on the results of research are of both theoretical and practical nature, and they suggest certain areas of improvement for the labor legislation of EAEU member states.

Results

The research has shown that the legislations of the countries display not only different degrees of remote work regulation, but also different attitudes to the opportunities for remote work of the individuals staying abroad which itself undermines the efficient use of highly qualified IT specialists on the territory of EAEU countries with a prospect of their labor's use beyond the borders of member states.

No country has managed to settle down the issue of remote work from abroad directly. At most, in some countries the local Ministries of Labor five some explanations regarding the matter in question.

In the Russian Federation an odd situation has come about when the Ministry of Labor and the Ministry of Finance have different views on the very opportunity of remote work from abroad. The Ministry of Labor has adopted the attitude denying this very opportunity. The Ministry of Finance does not see any impediments in the context of tax legislation application. In the Republics of Belarus and Kazakhstan, on the contrary, the Ministry of Labor does not see any impediments for remote work from abroad. In the Republics of Armenia and Kyrgyzstan, there is no special regulation of labor for remote workers at all which in a certain manner invalidates the entire situation.

Aside from legal regulation gaps that are common for all the countries, a few problems typical for certain countries only have been identified. They can be seen as legal impediments that can be dealt with under certain circumstances and with the help of legislative will. Aside from labor legislation barriers exclusively,

other restrictions have been identified, including those of situational nature, associated with economic and financial sanctions imposed on certain EAEU member states. Recognizing these impediments dealing with which goes far beyond the framework of this research, the governments of EAEU member states take certain steps in certain areas.

Discussion

Restrictions for remote engagement of IT specialists from abroad in the Russian Federation. The measures currently introduced in Russia to overcome a lack of highly qualified personnel in the field of IT have deescalated the problem a bit only, but they will hardly be able to solve it given that a deficit of highly qualified human resources emerged long before the events the aforementioned measures of the government are associated with.

What other barriers that could have been destroyed today already, could alleviate the situation in the high-tech segment of the labor market?

Firstly, it is a lack of a legal opportunity to engage the required workers on a remote basis regardless of where they reside. We have already written about the inconsequence of a whole number of explanations given by the Ministry of Labor to ground the impossibility of concluding labor contracts with remote workers living abroad (Zaitseva & Abakumova, 2021). However, since the arguments of the Ministry prompt new questions, more and more new letters are sent only to change the arguments, but not the essence of the attitude to these opportunities. One of the last letters of the Ministry of Labor and Social Protection of the Russian Federation on the matter published in 2022[11], unlike the previous ones, explains that the Russian legislation is applicable to the foreigners residing on the territory of the country only. In our opinion, it rather displays the problem of the Russian labor law with no conflict rules. As it appears, in the context of work and labor market virtualization, this issue shall be settled and a regulatory provision shall be included in the Labor Code – one that allows applying labor legislation provisions of the country within the jurisdiction of which the employer stays as a beneficiary of the worker's labor activity results.

Besides, the Letter by the Ministry of Labor of 2017[12] includes the argument that, in the Ministry's opinion, also does not allow exercising labor relations remotely abroad, since the employer is physically unable to encompass their obligations to such a worker in terms of labor safety. So, while all the orientations and trainings can be arranged remotely as well, how can an occupational accident be investigated as required by the Labor Code of the Russian Federation? In this case, the Order of the Ministry of Labor 'On Approval of the Provision on Specificities of Investigating Occupational Accidents in Certain Industries and Organizations, Document Forms, Respective Nomenclatures Required for Occupational Accident Investigation'[13] should be amended by introducing an opportunity for application of online procedures, electronic document flow, etc. Or, in the worse case scenario, a mandatory rule may be introduced to install supervisory programs on the computer of a remote worker which is now possible to arrange for the purpose of labor safety due to Art. 214.2 of the Labor Code of the Russian Federation as a way to prove the potential connection between the accident and the occupation. That said, in the lack of an opportunity for the injured party to undergo the expert proceedings to identify the extent of a persistent disability as established in the Russian Federation, the rules regarding fixed insurance payments at the occurrence of an insured accident may be provided for. Naturally, if such an option is chosen, respective amendments shall be introduced into the Federal Law 'On Compulsory Social Insurance Against Industrial Accidents and Occupational Diseases'.

Secondly, perhaps, it is quite a broad definition of remote work that was introduced into the Labor Code of the Russian Federation after the amendments caused by Federal Law No. 407-FZ which practically

[11] Letter of the Ministry of Labor and Social Protection of the Russian Federation No. 14-4/10/V-1848 'On Legislation Applied in Case of Concluding a Remote Employment Agreement with Foreign Citizens to Perform Labor Activities beyond RF' dated February 15, 2022. Available at: http://www.consultant.ru/cons/cgi/online.cgi?req=doc&ts=nqWXk8TOo9toKgvZ2&cacheid=F2F60A728A8F0729C81BC2752BA0A9F3&mode=splus&rnd=3mVDQ&base=QUEST&n=209833#G3Y9NNTUtZ3WC7qo [Accessed: 11 September 2022].

[12] Letter of the Ministry of Labor of Russia No. 14-2/OOG-245 dated January 16, 2017.

[13] Order of the Ministry of Labor of Russia No. 223n 'On Approval of the Provision on Specificities of Investigating Occupational Accidents in Certain Industries and Organizations, Document Forms, Respective Nomenclatures Required for Occupational Accident Investigation' dated April 20, 2022. Available at: http://pravo.gov.ru [Accessed: 01 June 2022].

equated remote work and telework that prevents the problem from being solved radically through statutory recognition of an opportunity for remote work. In the context of the subject in hand, the viewpoints of the Russian scholars that have always stood and still stand for a need to distinguish between remote work and telework even more legitimate (Golovina, 2020; Yeremina, 2020). The work of an IT specialist performed virtually, in the Internet exclusively, responds to the conflict regulation of transboundary relations suggested above rather well actually, as it provides for application of the labor legislation of the country where the employer resides. Another thing is a 'remote worker' who uses the Internet to contact the employer only while working 'on the land' in the country with another jurisdiction. A sales representative is a good example. Such an employee with a stationary workplace abroad may not be stripped of their labor protection rights and guarantees in their entirety. The workplace of such an employee shall be properly assessed in terms of working conditions and labor protection (the workplace of such an employee may not be excluded from the general rules of a special assessment of working conditions as it is established for remote workers). Since the work of such an employee does not come down to dealing with a computer, the risks of an occupational accident are not only significantly higher for such a worker in comparison to the remote worker engaged in the 'virtual' work exclusively – they can even largely exceed the risks of conventional workers whose workplace always stays under the supervision of an employer who, among other things, monitors and ensures the proper working condition and labor protection. All these considerations can explain the formal negative approach of the Russian Ministry of Labor to the opportunity of remote work from abroad. However, in this case, it is required either to return to the issue of distinguishing between the remote work and the telework for consequent positive regulation of remote work from abroad for IT specialists and other workers whose occupation is similar by its nature, or to establish special rules for the latter ones (special regulation in the framework of specificities the remote work regulation is notable for).

Thirdly, it is the financial sanctions imposed against our country that prevent development of remote employment abroad significantly. Nowadays, there is actually a lack of an entire set of measures designed to cope with the sanctions, so that the employers could encompass their obligations on timely payments to the workers that have found themselves abroad. Until recently, an opportunity to use the cryptocurrency for these purposes have been considered in literature (Leskina, 2020). However, with the adoption and consequent amendments to the law on cryptocurrencies in Russia[14] the issue has been taken off the table predictably, as now the Federal Law prohibits using the cryptocurrency as the means of payment. Nevertheless, in April 2022, it became known that Zavod-IT, an IT company from Yekaterinburg, offered its employees to be paid in one of cryptocurrencies if they wished so – bitcoins, ETH, USDT or XRP. The head of the company explained in his interview to The Forbes that it was a forced decision due to the financial sanctions introduced against the Russian Federation and the difficulties that had arisen from a need to pay the workers residing in Kirgizia, Kazakhstan, Azerbaijan, USA, Thailand, and Ukraine (Titova, 2022). Thirty percent of employees turned to that means of payment at once, and other workers started expressing similar wishes to the employer. The head of the company did not specify how it aligned with the requirements of the Russian legislation, including labor legislation, though. Even supposing that a cryptocurrency, while not being a legitimate means of payment, is equated with a non-monetary form of payment for labor, its maximum share in the payment for labor, as it is known, may not exceed 20%. And if a legal practitioner equals it to coupons, liabilities or vouchers, such a payment may be considered an administrative infraction with all ensuing consequences. However, nothing prevents an employee who has their wage in rubles transferred to the account in a banking company from converting rubles into a cryptocurrency with its further transfer abroad and a possible conversion into a fiat currency again through well-known 'remote operations' using mobile banking or other applications. Can the employer ensure all the aforementioned operations though?

Nowadays, the issue of financial restrictions can be dealt with by transferring the wages via the banks of the countries that have not imposed sanctions on the Russian Federation. A special focus here is on the friendly countries the regulators of which together with the Central Bank of Russia create a single payment area, including interaction of Faster Payments Systems. First of all, it applies to EAEU, BRICS and SCO member states.

Also, it is still possible to transfer the wages to the e-wallets, since it is not all the systems the sanctions against Russia have affected. An opportunity of wage transfers to the e-wallets has been confirmed

[14] Federal Law No. 259-FZ 'On Digital Financial Assets, Digital Currency and on Amendments to Certain Legislative Acts of the Russian Federation' dated July 31, 2020 (revised on July 14, 2022).

by the Federal Service for Labor and Employment (Rostrud) with a respective explanation. That said, it is impossible to miss that when an e-wallet is used, the transaction costs increase. Besides, not all the global companies – operators are banking organizations which contradicts Art. 136 of the Labor Code of the Russian Federation. From this perspective, the improvement of wording of the aforementioned article by introduction of an alternative payment to the account of the banking organization exclusively at least in case of emergency might be considered.

Thus, nowadays, it is a whole number of gaps in the Russian legislation that could be eliminated easily enough, but still get in the way of extending opportunities and engaging highly qualified specialists through digital technologies.

Specificities of remote work regulation in the Republic of Belarus and labor legislation methods of IT industry development. The law of the Republic of Belarus defines the remote work in Art. 307[1] of the Labor Code as the work performed by a worker outside the location of the employer using information and communication technologies for labor activities and interaction with the employer. Unlike the Russian Federation, a remote employment agreement is concluded in the Republic of Belarus only under the condition of such a worker's personal attendance. This can make it difficult for a specialist residing abroad to choose this type of employment freely. The Belarusian scholars, specifically, K. L. Tomashevsky consider the rule regarding the remote worker's personal attendance at the time of concluding the remote employment agreement not quite justified, as the worker can reside far from the employer, including some place abroad (Tomashevsky, 2021b). In Russia in its turn the Labor Code provides for an opportunity to conclude a labor contract with a remote worker by exchanging the electronic documents which does not require the worker's personal attendance and simplifies recruitment options regardless of the employee's actual place of residence.

However, in the Republic of Belarus the legislator treats such issues as labor protection of remote workers more liberally providing for the only obligation of an employer in the Labor Code – to inform a remote worker with the requirements regarding labor protection for them to use the equipment or tools provided or recommended by the hirer. The remaining obligations of a hirer in terms of labor protection may be provided for (or not provided for) with a labor contract. Such an approach, on the one hand, practically strips the remote worker of any significant guarantees in the field of labor protection, but, on the other hand, it makes it as easy as possible to use the potential opportunity of staying within another jurisdiction while performing employment duties and remaining the subject of labor relations regulated by the labor legislation of the Republic of Belarus. The last is confirmed, among other things, with a direct instruction in Art. 307[2] of the Labor Code of the Republic of Belarus specifying that the place to conclude the labor contract with a remote worker is always a place of the employer's residence.

As for the opportunities of remote work from abroad in accordance with the Belarusian legislation, on March 16, 2022, IT companies of Belarus received respective explanations from the Ministry of Labor and Social Protection of the Republic of Belarus (Voinich, 2022). The Ministry explained that the issue lies under cognizance of labor contract parties that can restrict the remote work on the territory of the Republic. However, as it stems from the aforementioned explanation, there is nothing to restrict the remote work abroad aside from the parties of the labor contract.

Such an approach is quite new for the Republic of Belarus, and such a liberal attitude has not always existed. Until 2022, the Ministry of the Republic of Belarus used to give other arguments to the companies explaining the negative attitude to the opportunity in question not unlike the Russian Ministry of Labor and putting an emphasis on the fact the legal protection of such a worker can be ensured on the territory of the Republic of Belarus only due to the existing rules of the legislation in the area[15]. However, the Ministry of Taxes and Duties of the Republic of Belarus and the Social Protection Fund gave explanations regarding the issues of payment for the labor of remote workers residing abroad as early as in 2019[16].

As for an opportunity to pay the wage in cryptocurrency in Belarus, it is hardly legal nowadays. Despite quite extensive opportunities for the cryptocurrency turnover in Belarus provided due to Decree No. 8[17],

[15] Is Telework from Abroad Legal? An It Company Received Answer from SPF. Available at: https://devby.io/news/remote-fszn [Accessed: 12 October 2022].

[16] Good News from MTD: Telework from Abroad Will Not Affect Taxes. Available at: https://devby.io/news/mns-remote [Accessed: 12 October 2022].

[17] Decree of the President of the Republic of Belarus No. 8 'On Development of Digital Economy' dated March 18, 2017. Available at: http://law.by/document/?guid=3871&p0=Pd1700008e [Accessed: 15 October 2022].

according to Art. 74 of the Labor Code of the Republic of Belarus, the wage shall be paid in the Belarusian monetary units only, i.e. Belarusian rubles. The Republic of Belarus, just like Russia, faces the problems of transferring money abroad arising from the sanctions restrictions. The exception is only the settlement of payments between the individuals staying within these two countries.

Opportunities for 'digital nomads' in the Republic of Kazakhstan. The Republic of Kazakhstan became the first EAEU member state that introduced a chapter on remote work into the Labor Code in 2012 (Zhurunova, 2012). In 2021, a respective chapter of the Labor Code was amended, though the amendments still did not regulate the issues of remote work abroad as suggested by some representatives of the legal community of the country (Kolesnikova & Aimak, 2022). However, just like in the Republic of Belarus, the Ministry of Labor and Social Protection of the Republic of Kazakhstan gave written explanations regarding the opportunities for remote work from abroad according to the rules established by the legislation of the Republic of Kazakhstan (Kolesnikova & Aimak, 2022). Though, just like in all the EAEU member states, the letters of public agencies shall not constitute normative legal acts and, therefore, shall not create a proper ground for legal regulation. The standpoint of the Ministry of Labor of the Republic of Kazakhstan is indirectly confirmed with a new version of Art. 28 of LC of RK which specifies that 'in case of remote work the work site is not specified unless of mixed remote work'; therefore, no actual location of an employee is excluded, one abroad as well.

Some isolated insignificant hindrances for application of remote work of foreigners in Kazakhstan include the following specificities of remote work legal regulation. Firstly, Art. 138 of the Labor Code of the Republic of Kazakhstan specifies that the employer's obligation is to provide means of communication to the employee with their subsequent maintenance or a compensation for the use of employee's means of communication as well as a refund of other expenses related to the work for the employer based on the parties' agreement (Shuraleva, 2019). While it is complicated, but possible to pay the compensation, even through a conversion of expenses incurred in a foreign currency, actual payments abroad do not seem possible at all. That said, the mechanism of compensation of expenses incurred is complicated not only with the fact that they shall be compensated in the RK currency, though the expenses were incurred in a foreign state, but with the difficulties associated with documentary confirmation of such expenses unless their amount is not set forth in the labor contract itself without requiring any documentary support.

Secondly, Cl. 7, Art. 138 of the Labor Code of the Republic of Kazakhstan provides for the employer's fulfillment of a few obligations to the remote worker in the field of labor protection that appear problematic to be fulfilled in certain cases when the remote worker actually resides abroad. For example, like the investigation of an occupational accident (like in RF) and mandatory regular (throughout the labor activity) medical examinations and pre-shift medical clearance in the cases specified by the agreement, the collective contract and the legislation of the Republic of Kazakhstan.

As for the currency of the wage paid to a remote worker of the Kazakh company working from abroad, here are some options. In the letter of the National Bank of the Republic of Kazakhstan No. 21047/3129 yur dated October 23, 2008, it is specified that 'according to Articles 14–15 of Law No. 57-III of the Republic of Kazakhstan 'On Currency Regulation and Control' dated June 13, 2005, the currency transactions between residents and non-residents, including wage payment in a foreign currency, shall be performed pursuant to the procedure established by the currency legislation'. Thus, the legislation of the Republic of Kazakhstan provides the Kazakh employer an opportunity to choose the currency (national or foreign) when paying the wage to the foreign employee (Osetrova, 2022).

Since a foreigner working remotely from abroad is not subject to the mandatory pension insurance, their wage shall not be liable to charges for this kind of insurance. However, the employer calculates, withdraws and remits the social tax in the amount of 11% within their jurisdiction (Osetrova, 2022).

Today's state of affairs in the field of remote work legal regulation in the Republic of Armenia and the Kyrgyz Republic. Nowadays, the Labor Code of the Republic of Armenia does not regulate the remote work at all, except for Art. 106.1 introduced due to a need of employees for a temporary switch to the remote work because of the COVID-19 pandemic. Though the application of remote work from abroad is nowadays relevant for the Republic of Armenia largely because of its status as a 'host country' for 'digital nomads' (Tomashevsky, 2021a).

There are also no regulatory provisions on the remote work in the labor legislation of the Republic of Kyrgyzstan. A need for closing this legal gap has been noted by Kyrgyz scholars (Ramankulov, 2019).

Despite a lack of legal regulation in both countries, the remote work (telework) is largely used judging by the job sites.

Conclusion

Nowadays, levels of remote work regulatedness in different EAEU countries vary significantly (Pryazhennikov, 2021). From a lack of special regulation in Armenia and Kyrgyzstan to some chapters with various amounts of details in labor codes of other EAEU member states.

Remote employment of IT specialists abroad can be arranged so that such a worker does not become a working migrant. Such a specialist can work for the employer located abroad without leaving their country of residence (not citizenship). No laws of the EAEU member states provide for a special status in such a case, since to receive the status of a migrant worker a citizen of another state shall not only enter the country for subsequent employment, but also to work on its territory. However, a more complicated situation is easy to imagine – one where a citizen of one country works remotely for the employer located in another country while staying (residing) on the territory of the third country. So, currently all or at least some EAEU member states face the following problems preventing efficient use of human resources abroad on a remote basis – the problems that should be solved by one of means suggested below.

1. Nowadays, there are no conflict rules in the labor codes of EAEU member states that could have allowed solving the problem of the transboundary application of labor legislation. This problem has been studied in the legal science multiple times already (Shesteryakova, 2010). Here can be considered an approach providing for an opportunity to apply the laws of the country where the labor contract was concluded (the place of employer's residence) for transboundary labor, unless otherwise agreed by the parties in the framework of the labor contract.

2. The legal orders that provide for a lack of alternatives for in-person conclusion of a labor contract with a remote worker (e.g. in the Republic of Belarus) shall provide for an opportunity to introduce the electronic workflow (in a broad sense of this word) (Golovina & Zaitseva, 2022).

3. A list of employer's obligations in the field of labor protection for a remote worker shall be treated more thoroughly. The existing responsibilities shall be revised, the feasibility of their fulfillment for a remote worker shall be assessed (despite the actual place of the worker's stay). Besides, special rules for investigation of occupational accidents with remote workers in case they work while actually staying abroad shall be regulated. Perhaps, that is where a wider application of the electronic document flow and/or rules of installment of special software on a PC shall be considered in order to supervise the employee in terms of observance of safety regulations and/or labor discipline (which is partially already provided for in some countries).

4. Some questions regarding taxation may arise, though they shall be solved based on agreements on double taxation prevention and synchronization of tax legislations of EAEU member states, establishment an efficient mechanism of supranational and national legal and regulatory frameworks (Mambetaliev & Mambetalieva, 2015). The main issues in this field are resolved with the Treaty on the Eurasian Economic Union (Art. 98)[18]. Meanwhile, the problem of improper fulfillment of fiscal liabilities by a citizen of an EAEU member state may arise in case they move between countries actively which prevents them from obtaining the status of a tax resident.

5. Active steps are required to create a single payment area, including the Faster Payments Systems. Nowadays, due to multiple reasons, it is premature to speak about payroll processing through cryptocurrencies. And, since in most EAEU member states cryptocurrencies are not legitimate means of payment nowadays, even though used in practice by some employers to circumvent the restrictions imposed by the Western countries while violating national laws. Another reason is that foreign cryptocurrency exchanges supported the financial sanctions which resulted in a low level of the worker's security when these very risky financial tools are applied for payment.

References

Golovina, S. Yu. (2020) The Pandemic of a Coronavirus Infection (COVID-19) as a New Challenge for the Labor Law. *Trudovoe pravo v Rossii i za rubezhom*. 3, 3–8. (in Russian)

[18] Treaty on the Eurasian Economic Union: signed in Astana on May 29, 2014. Available at: http://www.eurasiancommission.org/ [Accessed: 20 October 2022].

Golovina, S. Yu. & Zaitseva, L. V. (2022) *Electronic Document Flow: from Legal Experiments to the Practice*. *Pravoprimenenie*. 6 (2), 241–256. (in Russian)

Kolesnikova, M. & Aimak, A. (2021) *Remote Work in Kazakhstan (including the Remote Work of Foreign Employees)* Available at: https://gratanet.com/ru/publications/distantsionnaya-rabota-v-kazakhstane [Accessed: 12 October 2022].

Leskina, E. I. (2020) Issues of Digitalization in the field of Labor. *Pravo i Tsifrovaya Ekonomika*. 2, 17–21. (in Russian)

Mambetaliev, N. & Mambetalieva, A. (2015) Taxation of Personal Income in EAEU. *Nalogovyi Vestnik*. 5, 86–90. (in Russian)

Osetrova, I. (2020) *Recruitment of a Remote Foreign Worker*. Available at: https://defacto.kz/ru/content/priem-na-rabotu-inostrannogo-rabotnika-osushchestvlyayushchego-svoyu-deyatelnost-distantsion [Accessed: 12 October 2022].

Pryazhennikov, M. O. (2021) Digitalization in Labor Law of EAEU Member States. *Trudovoe pravo v Rossii i za rubezhom*. 4, 46–49. (in Russian)

Ramankulov, K. S. (2019) Problems of Legal Regulation of Informal Employment (as exemplified by the Kyrgyz Republic). *Trudovoe pravo v Rossii i za rubezhom*. 1, 53–56. (in Russian)

Shesteryakova, I. V. (2010) Collision Rules in the Fundamentals of Labor Legislation of EurAsEC Member States. *Trudovoe pravo v Rossii i za rubezhom*. 3, 34–38. (in Russian)

Shuraleva, S. V. (2019) Remote Work: A Comparative Analysis of EAEU Member States' Legislations (part 1). *Trudovoe pravo v Rossii i za rubezhom*. 4, 41–44. (in Russian)

Titova, I. (2022) *Protection from Inflation and a Bonus for Millennials: Who and Where Pays the Wage in Cryptocurrency*. Available at: https://www.forbes.ru/finansy/468199-zasita-ot-inflacii-i-bonus-dla-milleniala-kto-i-gde-platit-zarplatu-v-kriptovalute [Accessed: 12 October 2022].

Tomashevsky, K. L. (2021a) Labor Activity of Working Migrants and Digital Nomads: a Comparison of Legislations of EAEU Member States. *Trudovoe i sotsial'noe pravo*. 1 (37), 52–57. (in Russian)

Tomashevsky, K. L. (2021b) A Remote Employment Agreement in Belarus, Kazakhstan and Russia: a Comparison and Ways of Legal Regulation Rapproachment. *Collected works: The First Legal Forum in Yaroslavl. A collection of scholarly articles on the issues of labor law*. P.G. Demidov Yaroslavl State University. Yaroslavl, 35–46.

Voinich, A. (2022) Is Remote Work from Abroad Legitimate? *Argumenty i Fakty*. *AIF.BY*. Available at: https://aif.by/dontknows/zakonna_li_udalennaya_rabota_iz-za_rubezha [Accessed: 10 October 2022]. (in Russian)

Yeremina, S. N. (2020) Remote Work in the context of COVID-19 Spread. *Trudovoe pravo v Rossii i za rubezhom*. 3, 8–11. (in Russian)

Zaitseva, L. V. & Abakumova, O. A. (2021) Virtual Mobility and Transboundary Remote Work: The Current Reality and Legal Uncertainty. *Bulletin of the Tomsk State University*. 464, 239–250. (in Russian)

Zhurunova, M. K. (2012) The Concept and Specificities of Remote Work in the Republic of Kazakhstan. *Trudovoe pravo v Rossii i za rubezhom*. 2, 51–54. (in Russian)

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Research Article

WORKER ADAPTATION AND LABOR RELATIONS

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The concept and types of adaptation experienced by an employee and employer during labor relationships are analyzed in the paper. Staffing and staff training issues are a priority in the modern world. When entering into labor relationships, the worker is in a new work group and starts to perform employment duties in a new position. This requires adaptation. Adaptation is a multifaceted phenomenon (process). In the author's opinion, it can vary, including the scenarios arising during legal relationships. As is noted in the paper, there are almost no provisions regarding legal regulation of the adaptation process in the current labor legislation. Adaptation is classified as occupational and non-occupational. In the framework of labor relationships, occupational adaptation is of especial interest, since it includes professional, psychophysiological, sociopsychological, organizational, economic and labor adaptations. An analysis of professional and labor adaptation in terms of their definitions and contents has identified their differences. The paper is an attempt to research the issue of worker adaptation through the lens of labor legislation. Mentorship is definitely a component of professional adaptation. There is a special focus on the lack of any provisions regulating the mentorship institution in the Labor Code of the Russian Federation. The need to fill this gap by introducing supplements and amendments into the existing legal regulation mechanics has been pointed out. The conclusion has been drawn about the link between the probation period established with a labor contract and the professional or labor adaptation of the worker. Additionally, the author has made the assumption that probation upon entry into employment should be seen not only as the adaptation of a worker to a new workplace, but as the adaptation of an employer to a new employee as well. Among other things, it is a period when the worker's adequacy for the assigned job is verified. The opinion has been expressed that it is necessary to standardize the mentorship institution in the Labor Code of the Russian Federation.

Kew words: *adaptation, worker adaptation, types of adaptation, occupational adaptation, professional adaptation, labor adaptation, mentorship*

Introduction

One of prerequisites for stable development, operation and performance of any organization is comprehensive interaction between employees and employers whose actions need to be well-coordinated and aimed at improving the organization's overall performance. Another equally important issue – the staffing issue – includes not only talent acquisition, but their adaptation to the working conditions of a specific employer as well. The staffing issues are so highly significant in the modern world that the matter depends neither on the employer's activity type/form of ownership nor on their economic status. Many employers pay a lot of attention to talent acquisition, analyze the reasons for staff shortages, work

out in-house programs for worker adaptation. The relevance of the issue arises from the modern environment that is notable for intensive changes and transformations both in the economy and in engineering, in manufacturing technologies. In the context of transformational processes, the requirements imposed not only on employees, but also on employers change as well. Now, the ability to solve various objectives set for the organization is of particular importance, and so is the ability to adjust quickly to the current changes and align internal processes. All of this radically changes the priorities of the personnel policy for employers.

When entering into labor relationships, the individual should have a clear idea of the professional environment they are about to start working in. Also, they should know their employment duties, internal policies and procedures of a specific employer, and the working conditions offered by the employer. If the perceptions and expectations are inconsistent with the actual conditions, the individual who has entered into the labor relationships – the worker – finds themselves mentally unprepared for the challenges arising during the labor activity.

Efficient adaptation has a great strategic value for the employer. The worker's decision on whether they are willing to continue their labor relationships with the employer is made during the adaptation. It is this period when the employee assesses how they can fulfill their potential and whether their work will satisfy their major needs (Danchenko, 2006: 2). Therefore, the issue of the adaptation process and its efficacy arises.

Materials and Methods

The goal is to research the issue of professional, labor adaptation in the course of labor relationships. Goal setting predetermines the following objectives: to analyze the concept of adaptation; to examine the classification of adaptation; to identify the difference between professional and labor adaptation; to describe manifestations of professional and labor adaptations in the statutory regulations of the current labor legislation; to analyze the probation established upon entry into employment and mentorship through the lens of adaptation.

When labor relationships occur, the worker experiences adaptation that is not given proper consideration in Russian labor law – neither in terms of its doctrinal interpretation, nor in terms of legal regulation.

During the research, general scientific and special juridical methods were used. The methodology for studies largely suggests using methodological tools, ideas and concepts designed in the framework of the modern general theory of human resources management in a cognitively meaningful and comprehensive combination with labor law. Traditional analytical jurisprudence, largely based on a technical analysis in the context of various modifications of legal positivism point out significant patterns in establishing, developing and functioning of legal phenomena and processes. The textual approach allows identifying relevant legal ideas, defining the existing doctrinal, legal, and law-enforcement problems based on hermeneutics. The special juridical tools of the research activity used to write this paper also include a special juridical method, an interpretation method, and an analysis method. The main sources of information for the research can be classified either as acts of national legislation of the Russian Federation in the specified area or as doctrinal sources. The labor legislation of the Russian Federation, as well as works by A. Toffler, N. V. Samoukina, O. V. Shutova, T. M. Vershinina, P. V. Ruzanova have examined.

Results

The problems of adaptation during labor relationships have been examined, and so has the labor legislation that does not cover the concept of adaptation or its mechanics. In the text of the paper, two types of adaptation identified in economics – professional and labor – are analyzed in the context of the current regulations of the Labor Code of the Russian Federation.

Discussion

When adaptation is examined in terms of labor relationships, the issue of terminology comes to the forefront. The term 'adaptation' came to HR management from biology where it literally meant 'adjustment'. Since adaptation is the innate biological and psychological mechanism in a human being,

it largely occurs on its own. In most cases, an individual adapts to any conditions sooner or later or adapts them to themselves. A so-called social adaptation occurs – its social technologies are presented in the work of A. Toffler (Toffler, 1997: 32).

The term 'adaptation' is researched in social studies and humanities; it can be found in the theory of human resources management, social psychology and labor psychology; it is the target of interdisciplinary research with the goal of finding the best possible, efficient ways for people to adjust to the new environment (Samoukina, 2020: 22-30). Adaptation (Lat. *adaptatio* – adjustment) means the process of the worker's adjustment to the changing conditions of the surroundings, manufacturing, labor, or life itself (Yezhukova, 2017).

In the broadest sense of the word, adaptation is the process typical for any living organism, all the elements of the living system. There are two types of adaptation: biological and social (Shutova, 2000: 7). Within this work, biological adaptation has not been examined due to its physiological and general focus. Social adaptation is of a particular interest, since it is a 'special social form of interaction between the subject and the environment arising every time the subject enters a new social community and becomes an actor, a functioning element in this community' (Vershinina, 1986: 11).

It is worth concurring with O. V. Shutova who suggests that 'in the process of adaptation, not only adjustment to the conditions and lifestyle of the social environment takes place, but the environment is transformed as well' (Shutova, 2000: 7). Social adaptation is quite a succinct concept that includes the processes of human adjustment to various environments and takes place throughout human life. The type of social adaptation depends directly on the circumstances in which a certain individual finds themselves. All types of social adaptation are interconnected and they cannot take place in isolation; they are interdependent and mutually conditional.

'Adaptation' is not a legal term, it is mostly used in social studies, psychology, and economics. However, it is fair to assume that the legal nature of this term should not be denied, since adaptation as an adjustment process is typical for labor relationships as well. This is due to the mutual accommodation process of the employee and the employer. Additionally, adaptation is closely related to the labor organization process, establishment of working conditions, observation of the labor discipline, job duties performance, and determination of a work-rest schedule. Since the adaptation process is closely linked to the rights and obligations of the employee and employer, it should be subject to legal regulation.

The adaptation process should have the legal framework tied primarily to the definition of the concept and its mechanics. In the context of labor relationships, adaptation means the process of the employee and employer's adjustment to the changing conditions of the external and internal environments that effect the performance of the organization.

Before addressing professional and labor adaptations and their manifestations in the context of labor relationships, the types of adaptation need to be defined. By analyzing the varying level of sources and their systematization, adaptation can be classified as occupational and non-occupational. Occupational adaptation includes professional, psychophysiological, sociopsychological, organizational, economic and labor adaptations.

Professional adaptation is the process when the worker is integrated into a new area of operations, when they get to know the working environment, standards of labor activity, establishment and expansion of ties between the worker and the working environment (Afanasiev, 2014: 8). During professional adaptation, an extra chance to use opportunities and to master skills is provided, as well as to use the requisite professional qualities and qualifications and to integrate them into the organization's performance. In the course of professional adaptation, the worker shapes a positive attitude towards the employment obligations they perform. However, if we turn to the statutory regulations of labor legislation, we will not be able to find any provisions regulating the process, the period or the goal of professional adaptation.

It seems, the apprenticeship institution that is used to increase efficiency while the worker adjusts to the new working conditions and improves their professional skills and qualifications can also be classified as professional adaptation. During professional adaptation 'professional capabilities are improved due to acquisition of additional knowledge and skills, development of the personal qualities required for professional performance and the positive attitude towards the job' (Kobtseva, 2008: 105).

The period of the worker's professional adaptation starts as soon as labor relationships occur. According to Art. 57 of the Labor Code of the Russian Federation[1] (hereinafter the LC of RF), probation is one of additional terms in a labor contract. The probation period upon hiring is an optional term that can be established at the mutual discretion of the employee and the employer. Establishment of a probation period upon entering into a labor contract does not set any working conditions for the new hire different from those existing for other workers. The labor legislation prohibits discrimination. According to Art. 2 of the LC of RF, the main principles for the legal regulation of labor relationships and other relations directly associated with them should be prohibition of discrimination in the labor sphere; equality of rights and opportunities for employees; ensuring the right of each employee to the timely payment in full of fair earnings providing for a humane existence for the employee themselves and their family at no less than the minimum amount of labor remuneration fixed by federal law. To ensure implementation of these principles, the employer is obliged to ensure that employees receive equal payment for labor of equal value (Art. 22 of LC of RF). According to Art. 70 of LC of RF, when a labor contract is entered into, a provision may be made therein by agreement of the parties for the employee's probation to test their fitness for the job. The probation clause should be specified in the labor contract. According to Art. 71 of LC of RF, in the case of an unsatisfactory result of probation, the employer shall have the right to discontinue the labor contract with the employee before the end of the probation period. The Labor Code of the Russian Federation directly defines the goal of the probation period, noting that the scope of employment duties assigned to the worker in this period shall not be reduced.

All this is indicative of the fact that the probation established upon hiring not only suggests assessment of the worker's compliance with the occupied position, but also seems closely associated with the professional or labor adaptation of the worker. 'The fundamental difference between adaptation and probation is that probation is aimed only at professionalization of an employee, while adaptation at socialization as well' (Yezhukova, 2017). In the framework of the statutory regulations of the current labor legislation regarding establishment of probation upon hiring, from adaptation's perspective, it can be considered a general adjustment, including the adjustment of an employer to the new employee that is tied to the verification of the worker's adequacy for the assigned job.

As for labor adaptation, it should be noted that it constitutes a combination of professional and social orientation of the worker, mutual accommodation of the worker and the organization based on the gradual integration of the employee into the workplace amidst new professional, social and business working conditions (Yezhukova, 2017). Labor adaptation is a component part of the worker's socialization and adjustment to the conditions offered by a specific employer. Labor adaptation, according to P. V. Ruzanov, 'is notable for the worker's ability to use their personal potential, professional resources and qualifications rationally and efficiently to integrate them into the existing business situation in order to realize their needs and interests' (Ruzanov, 2007: 8).

It should be noted that labor adaptation is incorporated into the social and is considered its component part. Labor adaptation is the process of adjustment to organizational specificities of a certain employer. In the framework of labor relationships, it manifests itself in the worker's compliance with the internal policies and procedures of their employer, execution of the employer's instructions and establishment of a work-rest schedule.

When labor relationships develop, the process of labor adaptation, as well as one of professional adaptation, is not regulated. It appears that this process should be controllable, and the mechanisms for worker adaptation to the new working conditions should be regulated based on its type.

The adaptation process may be classified as internal and external. Internal adaptation is about a specific individual, their interaction with the work group (in case of labor adaptation) in a specific period of time in a specific environment. It should be noted that the following basic elements can be identified in the 'adaptation mechanism' (specifically, adaptation of a worker in a certain work group): first, the internal properties typical for this process, its controversial aspects, interaction of which defines its content and the general development tendency; second, the main stages the adaptation process undergoes while unfolding, specific stages of its development in time and 'social space'; third, social conditions or factors that have an impact on labor adaptation; fourth, organizational targeted tools to regulate and control these external

[1] Federal Law No. 197-FZ 'Labor Code of the Russian Federation' dated December 30, 2001.

and internal circumstances and conditions in order to affect the process per se' (Shutova, 2000: 8). Labor adaptation is a combination of three major adjustments: psychophysiological, social and economic that remain in constant interaction and organic unity (Ruzanov, 2007: 19).

Labor adaptation of a worker can either succeed or result in negative consequences. The outcome will depend on the so-called 'adaptive potential' of the employee, on the stage of the adaptation period, on the type of adaptation, on whether it is primary or secondary. The adaptive potential of a worker depends on the level of their professional, psychological, moral and emotional training. From the perspective of labor relationships, the adaptive potential of a worker depends on professional skills and qualifications they have, as well as on the individual abilities associated with the ability to actively master the specifics of the job duties.

Psychophysiological adaptation is familiarization with the set of all the conditions having varying psychophysiological effect on the employee during the labor activities. These conditions can include physical and mental loads, degree of routine work, sanitary and hygiene standards of the operational environment, the labor rhythm, the convenience of the workplace, external influencing factors determined by the working conditions that should be provided by the employer. This type of adaptation is essentially about getting the worker adjusted to the environment of the organization and the region where it is located. According to the labor legislation, the employer is obliged to ensure safety and working conditions that meet state labor protection regulations. Psychophysiological adaptation is nothing but the adjustment of the worker to new physical and mental loads, physiological working conditions.

As for sociopsychological adaptation, it should be noted that it is a part of occupational adaptation and it takes place simultaneously with the individual's adjustment to the working conditions and their interaction with the work group.

Organizational adaptation manifests itself in the worker's introduction to the organizational mechanics of corporate management, adaptation to the job and the workplace where the employee performs their labor duties. With this type of adaptation, the worker is integrated into the work group, granted the legal rights associated with the ability of managing the organization. According to Art. 21 of the LC of RF, the employee shall have the right to unite, including the right to create trade unions and join them to protect their labor rights, liberties and legal interests; participate in the management of the organization in the forms envisaged in the labor legislation; arrange collective negotiations and enter into collective contracts and agreements through their representatives, as well as the right to information on the fulfillment of the collective contract, agreements. This type of adaptation should ensure that the worker understands and recognizes their labor rights and the opportunities to exercise them within the organization.

Economic adaptation. Every profession has its own ways to provide financial incentives, and wages are tied to the working conditions and labor organization. The object of economic adaptation is a wage level and the timeliness of its payment that has become particularly relevant recently (Yezhukova, 2017). Economic adaptation in the framework of labor relationships manifests itself in the employer's obligation to pay wages not less than every half a month on the date specified. If the employer fails to fulfil this responsibility, they shall be held liable for the arrears in wage payment. With this type of adaptation, the worker adjusts to specificities of the wage structure and the payment procedure. The wage structure and payment procedure are established by the local acts of the employer that the worker should read before signing the labor contract.

Based on previous experience, worker adaptation can be classified as primary or secondary. Primary adaptation is occurs upon hiring, upon entry into labor contract, mostly with workers who have no employment history and get hired for the first time. According to Art. 68 of the LC of RF, when someone is being hired (before a labor contract is signed) the employer is obliged to have the employee read the in-house employee rules, other local statutory regulations directly relating to the employee's labor activity and the collective agreement and sign that they have done so. Fulfillment of this responsibility is an element of the worker primary adaptation that allows them to get information about labor activity, specificities of the organization's functioning and its rules.

During primary adaptation, the employer can use other adaptation methods, e.g., the mentorship institution, to form professional skills. In the course of primary adaptation, aside from labor and professional adaptations, psychophysiological and economic adaptations occur as well.

Secondary adaptation is assistance in shaping communications and professional and/or management skills of the employee who has taken a new position as a result of rotation or promotion. First of all, the new leader needs to form communications with former colleagues – now subordinates. While they used to fulfill shared professional tasks and maintained friendly relations before, now their task is to lead the subordinates, to manage and assess their work. It might take up to half a year or even more to build the relationships (Samoukina, 2020: 22–30).

Secondary adaptation occurs when the employee is transferred to a new job with or without a change in profession, as well as upon entering into a labor contract with the workers who have an employment history. Secondary adaptation in the framework of labor relations can be related to a change in the labor contract regulated by Chapter 12 of the LC of RF. Observance of the notification procedure is the start of the secondary adaptation process.

Primary and secondary adaptations pursue the following goals: 1) to inform the worker about the employer's rules and statutory regulations upon entry into the labor contract; 2) to make the worker aware of specificities of the employment duties (reading the job descriptions); 3) to create the working conditions required for fulfillment of the work obligations; 4) to assign the worker to a mentor if necessary; 5) to get the employee to shape the competencies required for successful work in the company; 6) to arrange a suitable workplace for the employee, one that corresponds to the norms of the current legislation.

While focusing on occupational adaptation, it should be noted that it can be of various types that characteristically exhibit a system of objective and subjective indicators. The objective parameters are those that can be registered objectively through various methods (special devices, expert assessment, observation) and used to describe the efficiency of the labor activity, activity by employees in various spheres. The subjective indicators of adaptation efficiency characterize the employee's attitude towards the job in general or to its certain aspects. They are examined using a survey for the employee, psychological testing (Kobtseva, 2008: 101).

I would stand with E. D. Simanina in her opinion that 'the system of personnel adaptation in the organization includes orientation, assignment to a mentor and on-the-job training' (Simanina, 2018). The term 'mentorship' originates from the English 'mentor' (Greek: *men* – a thinker, *tor* – the suffix for male gender), so the translation is rather literal. In the times of the USSR, the mentorship institution was well-developed and used for staff training at enterprises. Mentorship emerged based on patronage in the 1920s. Development of the institution declined in the 1930s, particularly – in the years of the Great Patriotic War that made it necessary to train staff quickly in order to perform professional activity. In the middle of the last century, the mentorship institution was studied, mostly in the field of pedagogy. In 1970-90s, mentorship became a part of the state policy for highly qualified staff training. After the breakup of the Soviet Union, the mentorship institution was undeservingly forgotten due to the closure of state-owned enterprises and the disruption of the continuous education chain.

In 2013, V. V. Putin, the President of Russia, emphasized at the State Council session: 'An efficient incentive system for mentors is required, and it should be the modern kind of mentorship, the transfer of experience and specific skills'[2]. In 2017, Prime Minister of the Russian Federation D. A. Medvedev supported establishing the all-Russian mentorship system. Subsequently, the President of the Russian Federation signed Executive Order No. 94 'On Bestowing the Badge of Merit for Mentorship' dated March 2, 2018[3]. According to cl. 1 of that Executive Order, the mentors of youth are some of the highly qualified workers of industry and agriculture, transport, engineering and technical workers, state and municipal officials, teachers, professors and other workers of educational organizations, doctors, workers of culture and people arts honored for their personal merits of at least five years.

Mentorship is a type of adaptation for the workers of a specific employer, as well as an element of management technologies with a positive effect. Thus, S. Ya. Batyshev notes that the mentorship is based

[2] V. V. Putin. A speech on the joint session of the State Council and the Presidential Commission on monitoring achievement of the target indicators of social and economic development of Russia. Available at: https://regnum.ru/news/economy/1748854.html [Accessed: 10.30.2022].

[3] Executive Order No. 94 'On Bestowing the Badge of Merit for Mentorship' dated March 2, 2018 (revised on November 19, 2021) (along with the Provision on the Merit Badge for Mentorship).

on ‘creative use of regular worker experience for professional and social adaptation of students and young workers at the enterprise’ (Batyshev, 1985: 89).

Mentorship is an institution aimed at shaping or improving professional skills and qualifications of an employee, shaping the competencies of a mentor. It is also an element of professional adaptation. As for the legal regulation of the mentorship institution, it should be noted that the Labor Code of the Russian Federation lacks any provisions defining the legal position of a mentor and a mentee, the period and the concept of mentorship.

Legal regulation of the mentorship institution for the state civil service came to be with RF Government Decree No. 1296 ‘On Approval of the Provision on Mentorship in State Civil Service in the Russian Federation’ dated October 7, 2019[4], and it also emerged on the scale of approval of local statutory regulations, by the representative of the hirer in case the aforementioned institution needs to be applied. According to RF Government Decree No. 1296, the objectives of mentorship are:

to increase awareness of the civil employee under mentorship about the areas and goals of the government body’s activities, the objectives it faces; and to accelerate the process of adaptation of the civil employee who has entered the state civil service for the first time or the civil employee with an employment history in state civil service who has joined this particular government body for the first time;

to develop in the civil employee under mentorship the abilities to perform the employment duties independently, proficiently and timely and to maintain the professional level required for their appropriate performance;

to increase the motivation of the civil employee under mentorship to perform their employment duties properly, and to engage in efficient and long-term professional service (RF Government Decree No. 1296).

RF Government Decree No. 1296 directly sets acceleration of civil employee adaptation based on the previous experience in state civil service as one of objectives for mentorship (primary adaptation of the civil employee who has entered the state civil service for the first time or the secondary adaptation of the civil employee with an employment history in state civil service who has joined this particular government body for the first time).

The author does not set out to analyze the legal regulation of the mentorship institution in this paper. The objective set is to show that mentorship is a regulatory manifestation of worker adaptation. The mentorship institution is incorporated into professional adaptation of the worker. It manifests itself in the mentor’s activities related to getting the mentee to shape abilities and skills of proficient, timely and proper performance of their employment duties set forth in the job description. Improvement in the mentee’s professional level is required for performance of job duties. Additionally, one of the goals of the mentorship institution is to increase the motivation of workers. One of the important aspects of mentorship is tied to the specificities of its implementation – it does not require leaving the workplace: the mentee performs the job duties right there.

Analysis of academic literature allows us to note a few components of the mentorship system. Thus, according to O. V. Basharina, they might include:

‘values and targets – this aspect defines the set of targets and values of professional education that can be important for all the employees of the enterprise included in the mentorship system;

organization and methodology – this aspect includes legal documents regulating mentorship activities, the program on professional development and mentor motivation, as well as the forms, methods and tools of the mentors’ work;

procedures and activities – this aspect is aimed at shaping the stages of mentorship activities, organization of interaction in the mentorship system;

results and updates – this aspect allows supervising the results of training and efficacy of the mentors’ performance, amending and updating the content and technologies of training’ (Bashirina, 2018: 18–26).

In the times of the USSR, mentorship used to be a form of interaction between educational establishments of all levels and manufacturing. It appears that this experience should be revived and introduced actively. According to the data of the Regional Mentorship Center of the State-Financed Institute of Further Vocational Education Kuzbass Regional Institute for Vocational Education Development, introduction

[4] RF Government Decree No. 1296 ‘On Approval of the Provision on Mentorship in State Civil Service in the Russian Federation’ dated October 7, 2019.

of the mentorship methodology will allow increasing the share of children aged 10–19 among the mentees from 10% to 70% by 2024 (of the total number of children residing in the Kuzbass), as well as increasing the share of enterprises providing their mentors from 2% to 30% (from the total number of enterprises operating in the Kuzbass) (Grigorieva, Chernyak, 2021: 65).

Nowadays, the corporate practices of foreign companies include other forms of new hire support and training along with mentoring, such as the buddy system and coaching. A newly hired employee is assigned a 'buddy', an employee of the same age working in the same position. Their functions do not include transferring in-depth knowledge (since they probably do not have it themselves). It is rather to watch over the new employee (Proshina, 2006: 36). As for coaching (from the English sports term 'coach'), it should be noted that the main task of the coach is not to look after someone, but to teach them, to cultivate abilities and skills. As a rule, the coach has special education that allows them to train the employee right at the employer's, at the workplace.

When using the foreign experience of personnel adaptation in the organization, it is wise to consider and apply only the best practices – well-tested, efficacious and universal.

Conclusion

Adaptation with the employer is the gradual integration of a new employee into full-fledged performance of their job duties. Worker adaptation includes not only training and onboarding, but also integration into the work group, adoption of the employer's standards of social conduct. In order to shorten the adaptation period, the employer should develop an adaptation system and program for workers with specific events and schedules assigned.

During the research, occupational adaptation was analyzed, including two types – professional and labor adaptation. Their differences were identified, including those that apply to labor relationships. The suggestion has been made regarding the need to set another goal of probation establishment upon hiring – professional and labor adaptation that can be seen not only as the employee's adjustment to the employer, but also as the employer's adjustment to the new employee. Additionally, it has been opined that legal regulation of the mentorship institution and the adaptation process is needed in the Labor Code of the Russian Federation.

References

Afanasiev, V. S. (2014) The Concept and Essence of Staff Labor Adaptation in Organizations, *Nauchnye issledovaniya i obrazovanie*. 2 (18), 8–11. (in Russian)

Alekseev, K. (2007) Business Bur in the Throat: On Employment of Graduates from Vocational Schools and Technical Colleges, *Professional*. 5, 18–22. (in Russian)

Basharina, O. V. (2018) Mentorship as a Strategic Resource for Vocational Education Quality, *Innovatsionnoe razvitie professional'nogo obrazovaniya*. 19 (3), 18–25. (in Russian)

Batyshev, A. S. (1985) *Pedagogicheskaya sistema nastavnichestva v trudovom kollektive* [A Pedagogical System of Mentorship in a Work Group], Moscow: Vysshaya Shkola. (in Russian)

Danchenko, R. O. (2006) *Upravleniye organizatsionnoi adaptatsiei v sovremennykh rossiiskikh organizatsiyakh* [Organizational Adaptation Management in Modern Russian Organizations], Pyatigorsk State Linguistic University, Rostov-on-Don. (in Russian)

Grigorieva, A. V. & Chernyak, E. F. (2021) Mentorship as a High-Quality Component, *Uchenye zapiski* (Altai State Academy of Culture and Arts). 3 (29), 60–65. (in Russian)

Kobtseva, E. N. (2008) Staff Adaptation: Classification and Indicators, *Vestnik VSU*, *series: Economics and Management*. 1, 100–104. (in Russian)

Proshina, A. N. (2006) *Adaptatsiya personala v rossiyskikh organizatsiyakh: sotsial'no-upravlencheskii analiz* [Staff Adaptation in Russian Organizations: Social and Managerial Analysis], Moscow: INFRA-M. (in Russian)

Ruzanov, P. V. (2007) *Trudovaya adaptatsiya rabotnikov v usloviyakh transformatsii ekonmiki: na primere promyshlennosti Severo-Kazakhstanskoi oblasti* [Labor Adaptation of Workers in the Context

of Economic Transformations: as Exemplified by Industry in the North Kazakhstan Region], Omsk State Technical University, Omsk. (in Russian)

Samoukina, N. V. (2020) Staff Adaptation: Challenges and Opportunities, *Upravlenie razvitiem personala*. 1, 22–30. (in Russian)

Shutova, O. V. (2000) *Trudovaya adaptatsiya rabotnikov v usloviyakh perekhoda k rynochnym otnosheniyam: na primere avtotransportnykh predpriyatii g. Omska* [Labor Adaptation of Workers during Transition to Market Relationships: as Exemplified by Vehicle Transport Companies of Omsk], Omsk State University, Omsk. (in Russian)

Simanina, E. D. (2018) Staff Adaptation Factors, *Nauchnyi zhurnal*. 6 (29), 67–68. (in Russian)

Toffler, A. (1997) *Futuroshok* [Future Shock], St. Petersburg: Lan. (in Russian)

Vershinina, T. M. (1986) *Vzaimosvyaz' tekuchesti i proizvodstvennoi adaptatsii rabochikh* [Interconnection of Employee Turnover and Occupational Adaptation], Novosibirsk: Nauka. (in Russian)

Yezhukova, I. F. (2017) Labor Adaptation of Employees, *Kontsept, a scientific methodological e-journal*. S1, 6–11. (in Russian)

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Research Article

PROBATION UPON HIRING: A NEED FOR TRANSFORMATION

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This publication invites discussion on the issue of probation upon hiring as an institution in need of transformation, in the author's opinion. The goal of probation should be specified, since it can be established either to test the fitness of an employee for the job assigned, or for the employee to decide whether the offered job is suitable for them. Also, it is necessary to resolve the issue of the exact rationale and the moment in time the labor relations with an employee should be terminated during probation in case they do not succeed. The author suggests introducing a new special rationale – termination of a labor contract at the end of the employee's probation without further employment of the worker at this employer's based on a wrongdoing by the employee during probation or in case the employer discovers that the worker's professional aptitude does meet the employer's requirements. These amendments to the legislation can allow identifying fault-based (disciplinary) grounds for the labor contract termination among all the cases when the worker was considered to have failed the probation upon hiring, as well as to link them directly to the institution of labor discipline. It is no secret that in practice, multiple issues regarding the interaction between the regulatory provisions on probation outcomes and the regulatory provisions on disciplinary responsibility of workers arise: these problems should be resolved, since the court practice examples provided by the author often show diametrically opposed conclusions made by the courts based on their interpretation of statutory regulations. Also, the paper invites discussion on the renunciation of possible replacing probation by a fixed-term temporary labor contract and establishing a probation model for the change in employment functions (transfer to a new job).

Key words: *labor law, probation upon hiring, legislation defects*

Introduction

According to Part 4, Art. 57 of the Labor Code of the Russian Federation No. 197-FZ dated December 30, 2001, a provision on probation for an employee upon hiring may be made in a labor contract as an additional term that does not deteriorate the employee's situation in comparison with the one established by the labor legislation and other legal acts containing labor law norms, a collective agreement, agreements or local normative acts. The legislator provides the content of this term in Art. 70 and Art. 71 of the Code.

It is remarkable that there are no optional rules in the aforementioned articles (Art. 70–71) of the Labor Code of the Russian Federation: even the revised version of Part 4, Art. 70, of the Code suggested by the legislator provides for an opportunity not to set probation for the individuals representing the categories specified in the collective agreement, but does not grant any additional opportunities to the parties to the labor contract, aside from deciding on whether the probation should be established within the limits defined by law. For a contractual term, such a situation is strange to say the least.

Since probation upon hiring is possible only for a certain period, many call it 'a probation period' (Moskaleva, 2016; Pivovarova, 2007; Slesarev, 2019; Chaevcev, 2014).

This term can hardly be considered suitable. In most EAEU member states, probation upon hiring is called exactly as such: probation (preliminary probation' – Art. 28 of the Labor Code of the Republic of Belarus; 'probation upon hiring' – Art. 62 of the Labor Code of the Kyrgyz Republic, Art. 91–93 of the Labor Code of the Republic of Armenia), although in Art. 36 of the Labor Code of the Republic of Kazakhstan the phrase 'a provision on the probation period in the labor contract' is used. Greater accuracy of the 'probation' term lies in the very essence of this assessment procedure of the worker's professional aptitude, as well as in the varying semantic load during various historical interpretations of these approaches. Historically, the 'probation period' is clearly about the administrative decision of the employer, not the employee.

Most academic papers on worker's probation upon hiring show imperfection of the legal regulation of this institution, pointing out its significant peculiarity and the constant need for interpreting regulatory provisions of labor legislation in court practice (Noskova, 2015; Presnyakov, 2014; Supryaga, 2015; Trubnikova, 2019). Besides, not all judicial decisions can be considered indisputable, particularly considering the fact that probation used to be a legal model in the Soviet period as well, and regulatory provisions on the matter have never been amended since, so, as a result, law-enforcement interpretation of multiple aspects of the legal structure is still based on conclusions and legal assumptions of the previous times.

All the aforementioned is clear evidence that the legal model of probation upon hiring should be reformed in Russian labor legislation.

Materials and Methods

Accomplishment of the goal set in this research paper predetermined the use of such general scientific and specific scientific research methods as scientific analysis, as well as the Aristotelian method, structured system analysis, the comparative legal method and the technical legal method. The author has studied the main aspects of the scholarly discussion on the subject of the research, analyzed the Russian labor legislation and the practice of its application, used the foreign experience of regulating probation upon hiring and made generalizations and independent conclusions.

Results

Analysis of relevant provisions in Russian legal legislation regarding probation upon hiring suggests the lack of provisions regulating this institution as well as the abundance of regulatory collisions and defects in the legal framework.

What particular defects are these? The first one is a lack of a clear legislator's position on who is on probation during the probation period upon hiring – the employee, the employer, or both. The second issue is that it is unclear what the employee can be tasked with during probation – full-scale work in accordance with obligations and rights, or just some parts of the job description that will be in force for the worker if they pass probation. This problem is directly connected with another one – labor legislation features some signs that probation upon hiring is a type of fixed-term labor contract, although the provisions of Article 57 of the Labor Code of the Russian Federation suggest that this is just a term of the labor contract with some attributes of a stipulation.

The fourth issue the legislator reflects upon is the dismissal procedure itself when a worker fails to pass probation. On the one hand, multiple practices have shown a link between this rationale for the termination of a labor contract and the violations of the labor discipline, although such a conclusion is impossible to be made based on the regulatory provisions – neither in a positive, nor in a negative sense. However, dismissal of an employee for an unsatisfactory result is not clearly differentiated from other grounds for termination of the labor contract upon the employer's initiative that can be applied to the employee during probation, since in this period of time the worker is subject to the labor legislation to the fullest extent. Also, it is obvious that there are some questions about what exactly the rationale for termination of labor relations should look like and how it should be formalized in case the employee fails to pass probation – see clause 14 of Part 1, Art. 81; clause 4 of Part 1, Art. 77 or Art. 71 of the Labor Code of the Russian Federation.

The conclusions drawn from the enforcement practices also do not provide any compelling arguments regarding why the probation period may not be extended within the framework specified by law. In its turn, the legislation also does not provide any logical explanation for why the institution of probation shall not be applied to the cases of the employee's transfer to another job (position).

To resolve these issues, as well as to shape a relevant structure for probation upon hiring in the legislation it is necessary to establish precisely what kind of probation shall be used – the employer's probation for the employee, the employee's probation for the employer, or a mixed assessment. Choosing the third option, the legislator should at least specify the timeframe and the allowed assessment forms, the consequences for the probationer, specificities of their legal status in the probation period.

Discussion

Considering what the lawmaking experience of other states suggests (Kiselev, 1998: 79), the most universally applicable arrangement for probation upon hiring is for each party to a labor contract to make their own decision regarding their future interaction. Essentially, the national labor legislation cryptically hints at the third model, but it has never been built systematically. For example, Part 1, Art. 70 of the Labor Code of the Russian Federation specifies that 'when a labor contract is entered into, a provision may be made therein by agreement of the parties for the employee's probation to test their fitness for the job'. Hence, pursuant to this provision, we test the employee only, so we need to concur with P. V. Savvina who noted that this regulatory provision should be supplemented with the specification of the probation's goal for the employee (Savvina, 2016: 52).

Out of all the aforementioned attributes, in the framework of the probation's perception as the employee's test for the employer, the legislation specifies only a certain period during which the employee can terminate the labor relations with the employer: Part 4, Art. 71 of the Labor Code of the Russian Federation secures the rule that if, during the probation period, the employee comes to the conclusion that the job offered is not appropriate for them, they are entitled to discontinue the labor contract at their own discretion, having warned the employer in writing three days in advance.

Another fact calls attention to itself: according to Part 1 of the same article, in the case of an unsatisfactory result of probation, the employer shall have the right to discontinue the labor contract with the employee before the end of the probation period, having warned them in writing no later than three days in advance while indicating the reasons that served as grounds to recognize this employee as having failed to pass probation. Therefore, the employee shall not report on the sources of their complaint to anyone, and their termination from work is formalized using the general procedure for labor contract termination upon the employee's initiative (clause 3, Part 1, Art. 77 of the Labor Code of the Russian Federation). So, the fact the employer 'has failed to pass the probation' as well as the exact reason remain known only to the would-be employee.

In many countries, the worker's opinion about their employer's shortcomings stems from the termination of labor relations precisely upon the employee's initiative rather than by agreement of the parties, but such an interpretation of law is unusual for Russia and it does not comply with the actual application of provisions on the voluntary termination of employment. That said, although, Art. 80 of the Labor Code of the Russian Federation on voluntary termination of employment (Part 3) contains an indication that in cases of established violation by the employer of the labor legislation and other normative legal acts containing the norms of labor law, local normative acts, the terms and conditions of the collective contract, agreement or labor contract, the employer shall be obliged to discontinue the labor contract within the time period indicated in the employee's application.

Following the claim that historically, voluntary termination of employment in our country has been established as an analog to labor contract termination by agreement of the parties, the employee's notification about the intention to leave as such does not imply any negative connotations toward the employer. However, what should be done about the scenario when in the probation period, the employee comes to the conclusion that the job they have been offered does not suit them, because the employer violates the rights of this employee or any others? Neither Art. 80, nor Art. 71, nor Art. 84.1 of the Labor Code of the Russian Federation does not specify that in case of the established aforementioned violations, the employer is obliged to include these data in the statement on the worker's

voluntary termination of employment. An imbalance between the employee's and employer's rights and responsibilities is obvious.

There is also no logic in the terms symmetrically chosen by the legislature for terminating the labor relations in the probation period without specifying the priority. For example, if an employee submits a letter of notice in case of voluntary termination, a notice of unsatisfactory probation results will go into effect the same day as the last working day of the employee. And, since in accordance with Part 5, Art. 84.1 of the Labor Code of the Russian Federation, an entry shall be made in the work-record book concerning the grounds and reason for the termination of the labor contract (singular) by the employer, it appears impossible for the employer to make two entries at once or to note two grounds for the termination of the labor law. So, obviously, the employer will choose the reason that is more beneficial for them. Such a situation would have been impossible if the law had granted the employer the right to terminate the labor contract with an employee in case of unsatisfactory probation not 'before the end of the probation period, having warned them in writing no later than three days in advance while indicating the reasons that served as grounds to acknowledge this employee as having failed to pass probation', but at a certain stage of the probation, at the instant strictly defined by law. It is logical to give the employer the respective right at the end of probation to rule out the employees' claims that they have not been given enough time 'to show their potential'. However, picturing a person who does not do anything for almost three months while the employer has to put up with them at the workplace, it must be admitted that such a long period of waiting is hardly always justifiable.

That said, particular focus should be on the provision of Part 3, Art. 70 of the Labor Code of the Russian Federation, specifically: 'during the probation period, the employee is covered by the provisions of the labor legislation and other normative legal acts containing norms of labor law, the collective agreement, agreements and local regulatory normative acts'.

Therefore, if an employee has allowed an unexcused absence during probation, for example, the decision on disciplinary action against them shall be made on common grounds without waiting for the end of probation. However, due to the lack of clear specifications for such situations in the law, the enforcement practices features a surprising diversity of viewpoints.

Thus, there is the viewpoint when the court decides that the right to choose the grounds for dismissal (disciplinary or based on probation results) is the exclusive right of the employer, since both options seem to suit them. For example, the appellate decision by the Nizhny Novgorod Regional Court of June 7, 2016, on case No.33-6651/2016 features the conclusion that 'under current law, it is the employer that has the right to choose the measures regarding the employee who has committed a violation, specifically: the settlement on whether to take any disciplinary actions against them or to terminate the contract upon the expiration of the probation period, in the course of which the employee has committed a violation'.

Also, there are the opinions of courts that are opposite in their arguments and conclusions to the aforementioned: these imply the idea of a correlation between the terms and the procedures for disciplinary actions for them to serve as justification for the worker's dismissal after they fail to pass probation upon hiring. Thus, the appellate decision of the Moscow City Court of June 23, 2022, on case No. 33-20771/2022 features the opinion that 'the conclusion of the probation results presented to the court with a reference to the violation of terms established for the tasks and the claimant's failure to fulfill the tasks assigned may not serve as refutable evidence of K. A. V.'s failure to pass probation, since no explanations were demanded from the claimant during the work in the framework of Article 193 of LC of RF, and neither was the employee held to disciplinary liability. There were no official administrative notes regarding the employee, and the witnesses to improper performance of duties by the employee did not confirm it in court'.

Referring to the fact that 'a labor contract with an employee may be terminated at any time during the probation period as soon as the employer identifies any evidence of a failure (improper) performance of employment duties', the Second Court of Cassation of General Jurisdiction in the decision of May 12, 2020, on case No.88-11317/2020, notes that 'among the reasons to acknowledge the results of K.'s probation as unsatisfactory, a notification from Ralf Ringer Management LLC, among other things, specifies multiple cases when the employee provided payroll accounting summary information with fallacies and violations of submission dates; unsatisfactory work with subordinates that translated into setting objectives beyond both their job description and the claimant's job description as well; an

incorrect manner of addressing subordinates that did not comply with the business etiquette established in the company; a failure to fulfill the assignments and instructions from the direct manager (Director of the Department for Finance and Economics A.) on preparing the regulations on bonuses. The procedure and terms for dismissal regulated by Art. 193 of the Labor Code of the Russian Federation have been met by the employer'.

The Smolensk Regional Court reasons that 'when drawing conclusions regarding the probation results, the employer considers all the circumstances that characterize the employee's business professional aptitude and competencies, not only whether the employee has violated the labor discipline and, therefore, should be held to disciplinary liability,' however, then the following is stated: 'The work guidelines of a building operation worker of LLC Mir Tekstilya Trading House include the points that were violated by claimants: watering green plants and beds, taking out the trash to a specific place, monitoring the sanitation condition of the operating territory (clauses 3.6, 3.7, 3.8 of the guidelines). Considering the aforementioned circumstances, the judicial board assumes that the employer complied with the procedure of bringing the claimant to disciplinary responsibility set forth in Art. 192, Art. 193 of the LC of RF and the defendant was legally entitled to apply the disciplinary actions. A disciplinary sanction for violating work guidelines is justifiable considering the severity of the committed misconduct and the circumstances under which it was committed <...> Having analyzed the presented evidence, the judicial board comes to the conclusion that the employer had the grounds to dismiss A. P. and L. Yu. based on Part 1, Art. 71 of the LC of RF as the individuals that had failed to pass probation upon hiring' (appellate decision of the Smolensk Regional Court of December 16, 2014, on case No. 33-4579).

The Moscow City Court, on the contrary, pointed out in the appellate decision of May 24, 2013, on case No. 11-13485, that the terms for prosecuting the claimant set forth in Art. 193 of the Labor Code of the Russian Federation do not matter when making a decision on terminating the labor contract with an individual who has failed to pass probation upon hiring. Quotation: 'The arguments of an appeal petition regarding the violation of requirements set forth in Art. 193 of the Labor Code of the Russian Federation by the defendant are based on incorrect interpretation of labor legislation, since, in accordance with Art. 71 of the Labor Code of the Russian Federation, the dismissal of an employee upon the employer's initiative is not a disciplinary action due to provisions of Part 3, Art. 192 of the Labor Code of the Russian Federation'.

A similar position was shown by the Samara Regional Court (appellate decision of February 13, 2018, on case No. 33-1921/2018), which noted that the dismissal (termination of the labor contract) of a worker hired under conditions of probation to test their fitness for the job based on unsatisfactory results of the aforementioned probation is, by its legal essence, not a disciplinary action in the sense set forth in Art. 192 of the Labor Code of the Russian Federation, so the employer in this case shall not be obliged to comply with the procedure established by labor legislation for bringing the employee to disciplinary responsibility, but shall comply with the procedure for termination of the labor contract with the employee who has failed to prove their fitness for the job as set forth in Art. 70 and Art. 71 of the Labor Code of the Russian Federation.

In terms of the law, the circumstances that shall not classify as a disciplinary offense in the sense defined by the labor legislation may serve as legal grounds for dismissal of a worker based on the unsatisfactory results of probation, although they objectively prove that the employee being dismissed does not fit the job due to this job's specifics. These circumstances may include, among other things, the employee's failure to comply with the local normative acts, as in the case both when there are signs of a disciplinary offense in their actions and when there are none of them'.

Only one conclusion can be made from everything cited above: the legislation on probation upon hiring allows opposing interpretation of its provisions. Therefore, it should be specified clearly what the procedure looks like for terminating a labor contract with an employee who has failed to pass probation, why exactly can the labor contract be terminated and within what timeframes.

The author assumes that the termination of labor relations based on the employee's failure to pass probation should constitute a special procedure besides the general rule that specifies that during probation, the worker is covered by labor legislation to the fullest extent. For this purpose, a certain date when the results are summarized should be clearly defined.

Since we introduce new grounds for terminating labor relations, it is more logical to summarize results only at the end of this period. Such a conclusion stems from provisions of Article 3 of the Labor

Code of the Russian Federation on prohibiting discrimination. If an employer already has the right to part with the employee at any time under common terms despite their status of probationer, this means the employer is not disadvantaged in any way. As for the employee, if we admit that they can be dismissed any other way during probation, but because of other grounds, they will be stripped of some due guarantees without grounds.

While it is allowed to assess the worker's professional aptitude both in terms of their competencies and in terms of compliance with the labor discipline, the termination of labor relations based on the results of probation upon hiring should be tied to the procedure of prosecuting the worker. That said, it should be clear why the employee was considered to have failed to pass probation upon hiring to avoid any discrimination.

Currently, there is basically a global problem – what the grounds for the employee's dismissal look like, the one that may be applied based on the results of probation, since, according to Part 5 of Art. 84.1 of the Labor Code of the Russian Federation, an entry shall be made in the work-record book concerning the grounds and reason for terminating the labor contract in strict compliance with the language of this Code or other federal law, and with reference to the relevant Article, part of Article, clause of Article of this Code or other federal law.

The relevant language of Article 71 of the Labor Code of the Russian Federation suggests indicating the employees as 'having failed to pass probation', but in the context of clause 4, Part 1, Article 77, 'the dissolution of the labor contract at the employer's initiative' may become the immediate grounds for terminating the labor contract, the unsatisfactory result of probation may turn into a reason for dismissal.

This reason, though, in its turn has other reasons – a wrongdoing by the employee in the course of probation and non-compliance of the worker's professional aptitude with the employer's requirements established by the employer. Therefore, the grounds for the employee's dismissal shall be independent, while alternative reasons shall also be specified as mandatory for the employer to choose from.

Taking the aforementioned into account, the author does not support the suggestions of some other authors to formalize the end of labor relations based on the failure to pass probation in accordance with clause 14, Part 1, Art. 81 of the Labor Code of the Russian Federation.

It should also be discussed whether an employee may be offered a formal labor contract for the period of up to two months by the employer instead of probation upon hiring – perhaps, even several times. Obviously, they may, since a labor contract for the period of up to two months essentially does not have such restrictions in terms of the content and/or categories of workers. Given that nothing is indicated otherwise in the labor legislation, during the probation period, an employee can be tasked only with a part of their future responsibilities or just a certain work within the employment functions, a fixed-term labor contract from temporary work (up to two months) with a probation term can be easily entered into instead of a conventional labor contract for the indefinite period of time. By the way, this also allows arranging a hidden probation for the workers representing the categories that shall not undergo probation upon hiring according to Art. 70 of the Labor Code of the Russian Federation. Both scientists and executors of law have been noticing such an obvious defect for quite a long time (Kotov, 2015: 55–56).

It should be noted that the labor legislation features certain signs that probation upon hiring can be considered a kind of a fixed-term labor contract, though the provisions of Article 57 of the Labor Code of the Russian Federation in the first approximation suggest that it is just a term and condition of the labor contract with some attributes of a stipulation.

Thus, the employer shall have the right to discontinue the labor contract with the employee before the end of the probation period having warned them in writing no later than three days in advance while indicating the reasons that served as grounds to acknowledge this employee as having failed to pass probation. Still, the same procedure – on notifying the intention to terminate the labor relations three days in advance – is set forth in Art. 79 of the Labor Code of the Russian Federation as a procedure ending a fixed-term labor contract. The regulatory provisions of the opposite content are also identical: if the term of probation as a fixed-term labor contract has expired, but the employee continues working, they are considered to have passed probation. Based on the aforementioned, probation shall be allowed both as an additional condition for a labor contract (when an employee is assigned with a full scope of tasks during probation) and an independent type of a fixed-term labor contract entered into considering precisely what

labor contract between the parties will come into force later, in case of successful completion of probation (Drachuk & Kuchina, 2020).

The similarity between a probation period and a fixed-term labor contract confirms the court's conclusion that 'the employer's non-compliance with the period of notification as such shall not serve as evidence of illegal dismissal if the result of probation has been acknowledged as unsatisfactory. However, it should be remembered that in case the period of notification is violated, the court may change the date of termination of the labor law. Such an order can have some consequences – for example, the obligation for an employer to pay the worker the average salary amount accumulated during the period of an enforced absence (Art. 139, 234, 394 of the LC of RF)' (Trubnikova, 2019: 79).

However, there are also the opposite opinions in the academic literature. For example, N. A. Pivovarova notes that 'establishment in special legislation of the regulatory provisions specifying the cases when a fixed-term labor contract may be entered into with an employee for the probation period should be considered negative practices (Pivovarova, 2007: 201).

What other legal regulation problems of probation upon hiring can be outlined briefly?

The conclusions drawn from the enforcement practices do not provide any compelling arguments regarding why the probation period may not be extended in the framework specified by law. Indeed, Article 70 of the Labor Code of the Russian Federation specifies that probation may be set once and by agreement of the parties. However, if the parties, for example, do not set the second probation period then, but just include a provision on probation of, let's say, one month in an addendum to the labor contract, and in a new version – of two months, what in this procedure contradicts the law? The only logical explanation is that it seems prohibited and the fact that the worker has not been dismissed as one who had failed to pass probation in the first period originally established for them. However, in this case, the opposite scenario is possible: if the employee does not agree to extending the probation period, they will lose the job, since the employer for some reason still doubts and, therefore, sees a reason for the employee to persuade them of their competence. Hence, at least in this case, the legislator shall somehow express their opinion clearly.

By the way, extending the probation period is found abroad. For example, Article L1221-21 of the Labor Code of France allows one-time extension of probation for the period specified by the industry agreement, but no more than twice (Filipova, 2015: 102).

It is also worth considering why the workers transferred to another job (position) should not be covered by the institution of probation. Actually, Part 1, Art.72.2 of the Russian Labor Code subtly covers the possible assessment of the worker for the purpose of their further promotion (transfer to another job) that features all the attributes of probation. Thus, by agreement of the parties entered into in writing, an employee may be transferred temporarily to another job with the same employer for the period of up to a year, and, if by the end of the transfer period, the previous job is not provided to the worker and they have not demanded it and continue working instead, the provision on the temporary nature of the transfer agreement becomes null and void and the transfer is deemed permanent.

Possibly, the main problem is with the employee who has failed to pass probation when transferred to another job, but the legislators have essentially given the answer already – transfer them to the previous place. Hence, there is nothing complicated about transforming this part of the law.

There is also nothing complicated about a clear correlation between the position of an individual under probation and the worker subject to performance evaluation, since both cases are about the assessing professional aptitude. Obviously, the individual shall not be subject to performance evaluation as long as they are under probation and, ideally, even after – at least similarly those who have received higher education.

Last of all, it should be established whether the individuals for whom probation upon hiring is not set shall be classified similarly to those that are hired without any competition through this procedure. Probation is not set for individuals selected based by competition to fill the relevant position arranged according to the procedure set forth in the labor law and other regulatory legal acts containing the labor law provisions, therefore, competition and probation shall be considered interchangeable procedures to assess the employee's business aptitude. The current approach creates the incentive for the employer

who does not have any restrictions for hiring to choose this very method of recruiting when there is the risk of getting among the candidates some citizens who may not be subject to probation.

And the final question that will hardly get an unambiguous answer is if the procedure of probation is necessary at all for the employees whose work is qualified and does not require confirmation of this very qualification. Even a conventional labor contract allows assessing the conduct of such workers under the conditions excluding their discrimination. We will agree with G. A. Trofimova that to admit the possibility of setting a probation period for the worker who meets the qualification requirements of the occupied position means casting doubt on the data available in the documents they present. Also, the additional verification of a documented qualification of the employee is not always conducted by the individual knowledgeable enough in a particular area (Trofimova, 2015: 46–47).

Conclusion

Considering the aforementioned, it appears necessary to reform the institution of probation upon hiring. The legislator should:

1) specify the goal of probation, noting that when a labor contract is entered into by agreement of the parties, a provision may be made therein or in a separate agreement for the employee's probation to test their fitness for the job, as well as for the employee to decide on whether the offered job is suitable for them;

2) specify clearly that in case probation fails, the employer shall have a right to terminate the labor contract with the employee based on these grounds, specifically having warned them in writing no later than three days in advance while indicating the reasons that served as grounds to acknowledge this employee as having failed to pass probation (per the clear specification of law, these reasons should also include the non-compliance by the worker's professional aptitude with the employer's requirements and disciplinary offenses committed by the worker in the probation period);

3) establish that during probation, the worker is covered by the labor legislation to the fullest extent, including the grounds for discontinuing a labor contract provided for by this Code and other federal laws except for the employer's right to terminate the labor law with the employee in accordance with clause 3, Part 1, Article 81 of this Code;

4) introduce a new special rationale into Article 81 (excluding mentioning Article 71 in Article 77 of the Labor Code of the Russian Federation) – termination of a labor contract at the end of the employee's probation without further employment of the worker with this employer based on a wrongdoing by the employee during probation or in case the employer discovers that the worker's professional aptitude does meet the employer's requirements;

5) introduce the following provision into Article 193 (Part 3) of the Labor Code of the Russian Federation: 'Disciplinary actions shall be taken no later than one month after a misconduct is revealed apart from the days when the employee was sick, was on vacation, as well as the time required to consider the opinion of the employee representative body. Disciplinary actions shall be taken at any time in the probation period before the end of the probation or may be replaced by termination of the labor contract upon the employer's initiative due to the end of probation without further employment with this employer for the worker based on a wrongdoing by the employee during probation. Such replacement is allowed in case of either multiple violations of the labor discipline by the employee in the probation period or a single severe violation of labor discipline by the employee in the probation period, with the subsequent disciplinary actions against the worker';

6) in this regard, amend the list of disciplinary punishments (Art. 192 of the Labor Code of the Russian Federation) with the aforementioned case;

7) in Article 70 of the Labor Code of the Russian Federation after the words 'persons who enter into a labor contract for the term of up to two months' introduce the phrase 'as well as persons who have previously entered into a labor contract for the term of up to two months with the same employer for the same employment function and hired by the same employer again given that the employee has not worked with this employer for the period at least equal to the probation period upon hiring over the last three years';

8) secure that probation is arranged for the individuals hired without any documents regarding their education and/or qualification or any special knowledge required.

References

Chaevcev, Yu. (2014) Ispytatel'nyi srok: esli rabotnik vas ne ustraivaet [Ispytatel'nyi srok: esli rabotnik vas ne ustraivaet]. *Trudovoe pravo,* 1, 41–52. (in Russian)

Drachuk, M. A. & Kuchina, Yu. A. (2020) Spornye voprosy konstruktsii srochnogo trudovogo dogovora kak formy vzaimnogo ogranicheniya prav rabotnika i rabotodatelya [Controversial issues of the construction of a fixed-term employment contract as a form of mutual restriction of the rights of the employee and the employer]. *Ezhegodnik trudovogo prava*, 10, 67–79. (in Russian)

Filipova, I. A. (2015) Trudovoi dogovor, poryadok ego zaklyucheniya i izmeneniya (na primere rossiiskogo i frantsuzskogo zakonodatel'stva) [Employment contract, the procedure for its conclusion and amendment (on the example of Russian and French legislation)]. *Rossiiskii yuridicheskii zhurnal*, 1, 99–104. (in Russian)

Kiselev, I. Ya. (1998) *Zarubezhnoe trudovoe pravo* [Foreign labor]. Moscow. (in Russian)

Kotov, V. (2015) Spory, vytekayushchie iz zaklyucheniya srochnogo trudovogo dogovora [Disputes arising from the conclusion of a fixed-term employment contract]. *Trudovoe pravo,* 7, 55–64. (in Russian)

Medencev, A. S. (2008) *Uvol'nenie po vsem stat'yam Trudovogo kodeksa RF)* [Dismissal under all articles of the labor code of the Russian Federation]. Moscow: Ekzamen. (in Russian)

Moskaleva, O. (2016) Uvol'nenie beremennoi sotrudnitsi na ispytatel'nom sroke [Dismissal of a pregnant employee on probation]. *Trudovoe pravo,* 2, 95–110. (in Russian)

Noskova, E. (2015) Obzor sudebnoi praktiki po voprosam, svyazannym s uvol'neniem po itogam ispytatel'nogo sroka [Review of judicial practice on issues related to dismissal following a probationary period]. *Trudovoe pravo,* 5, 19–28. (in Russian)

Orlovskij, Yu. P. (2019) *Kommentarii k trudovomu kodeksu Rossiiskoi Federatsii) [*Comments on the labor code]. Moscow. (in Russian)

Pivovarova, N. A. (2007) K voprosu ob ispytatel'nom sroke [On the subject of probation]. *Rossiiskii ezhegodnik trudovogo prava* (2006), 2, 199–208. (in Russian)

Presnyakov, M. V. (2014) Ispytatel'nyi srok: problemy pravoprimenitel'noi praktiki [Probationary period: problems of law enforcement practice]. *Sud'ya*, 9, 10–16. (in Russian)

Savvina, P. V. (2016) Garantii pri zaklyuchenii trudovogo dogovora na primere Rossiiskoi Federatsii i Cheshskoi Respubliki [Guarantees at the conclusion of an employment contract on the example of the Russian Federation and the Chechen Republic]. *Yuridicheski mir,* 8, 50–52. (in Russian)

Slesarev, S. (2019) Ispytatel'nyi srok [Probation]. *Trudovoe pravo*, 4, 5–17. (in Russian)

Supryaga, Zh. (2015) Ispytatel'nyi srok: uvol'nenie i spory) [Probationary period: dismissal and controversy]. *Trudovoe pravo*, 5, 29–37. (in Russian)

Trofimova, G. A. (2015) Primenenie nekachestvennykh ponyatii pri zaklyucheni (prodlenii) trudovogo dogovora [The use of low-quality concepts when concluding (extending) an employment contract]. *Advokat,* 9, 46–52. (in Russian)

Trubnikova, I. (2019) Oshibki rabotodatelya, kotorye privedut k vosstanovleniyu na rabote rabotnika, ne proshedshego ispytanie [Mistakes by the employer that will lead to the reinstatement of an employee who has not passed the probation]. *Trudovoe pravo,* 5, 73–79. (in Russian)

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Research Article

COMPARATIVE LEGAL ANALYSIS OF THE INSTITUTE OF SELF-DEFENSE BY EMPLOYEES OF LABOR RIGHTS IN THE EAEU COUNTRIES

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The problem of protecting the labor rights of workers definitely attracts the attention of labor /scientists not only within the framework of national legal, but also cross-border legal field. Thus, new issues arise in this area during the unification of labor legislation within the framework of the Eurasian Economic Union. If the jurisdictional ways of protecting labor rights are to some extent developed within the framework of the national legal order of the member states of the Union, then the institution of self-defense is deprived of the attention of the legislator in these legal orders. In this regard, it seems important to analyze such a way of protecting rights as self-defense, guided not only by the ideas of the national development of the institute in the legislation of the Eurasian Economic Union member countries, but also its implementation within the framework of Union labor law.

This work, as a scientific try to study the institute of self-defense by employees of their labor rights in the countries of the Eurasian Economic Union, takes as its basis a comparative legal scientific method. Applying this method, we can conclude that the legal model of self-defense of employees of their labor rights can be unified due to the uniform understanding of its nature by the legislation of most of the member countries of the Eurasian Economic Union.

Nevertheless, the defective and obviously insufficient elaboration of the regulation of labor and legal self-defense in the studied legal systems shows a number of practical and theoretical problems that will ultimately affect the consolidation of such a legal model[1] within the framework of the Eurasian Union labor law.

In this regard, it seems important to present a single legal definition of self-defense, comprising the fundamental features of this method of protection. The adoption of such a term will allow to form a uniform understanding not only among labor scientists, but also among law enforcement agencies, and will serve as a starting point for the further development of the institute of self-defense in the Eurasian Economic Union.

***Key words**: self-defense, employee, institute, legal model, Eurasian Economic Union, unification*

Introduction

As A. M. Lushnikov notes, today there is a tendency towards regionalization of labor legislation rather than globalization (Lushnikov, 2022). Today, a similar trend is appearing within the framework of the Eurasian Economic Union. Within the framework of the formation of a single labor market, the desire

[1] In Russian legal meaning, the term 'legal model' means the same as the term 'legal construction'.

for the formation of free labor migration (Golovina, Ljutov, 2022: 530), established by the treaty on the Eurasian Economic Union, questions invariably arise related to the functioning and development of union labor legislation. As a result, the legislator will always deal with issues related to the unification of labor law institutions existing in the national legal systems of the participating countries.

Among such models, which will need to be adapted to the goals and objectives of the above agreement, is the self-defense of labor rights by employees. This institution, which is present in the Russian legal order, as well as the legal order of other member states of the Union, has a number of features that must be taken into account not only due to national specifics, but also in the context of creating a successfully functioning legal model. It is important to note that no studies have been undertaken on the unification of the institute of self- defense of labor rights by employees within the EAEU, which carries a separate problem. But such a situation is logical: for example, in-depth research on the described institution is also clearly insufficient in the Russian legal order. Although the important nature of the investigated method of protecting labor rights was noted by the Russian legislator, who pointed out self-defense first among other methods of protection (Reprintsev, 2009). Such location is not accidental, since the employee first of all independently seeks to resolve the conflict situation within or outside the legal field. In addition, it is very important to note the nature of the implemented method of protecting the rights of employees, namely its implementation by a non-professional subject of legal relations.

Thus, guided by the need to develop the institution of self-defense in the space of the Eurasian Economic Union, the purpose of the study is to form a conclusion about the possibility of unifying the labor law model of self-defense of workers' labor rights in the legislation of the Eurasian Economic Union. To achieve this goal, the following tasks are set: research, analysis and comparison of legal regulation devoted to the self-defense of employees of their labor rights, as well as the proposal of a unified legal definition of self-defense of labor rights by employees of the member countries of the Eurasian Economic Union.

The hypothesis of this work is the following thesis: the understanding of the institute of self- defense by workers of labor rights by the participating countries, as well as by the observer countries of the EAEU, although not fully enough, is uniform, which, ultimately, will allow the institution under study to be harmoniously regulated within the framework of Eurasian labor law.

Materials and Methods

In order to achieve the goal and implement the objectives of this work, it is necessary to use the comparative legal method of scientific research. This method consists in the study of foreign law order in order to compare the legal regulation of self-defense by employees of their labor rights. According to scientists (Doronina & Semilyutina, 2021), this method aims to develop national law and order, in the context of a separate problem. Such a thesis is true for most comparative legal studies, but in this work, the comparative legal method will allow us to conclude that it is possible to form a unified labor law model in union labor law.

It is important to note that this method is often found in labor law studies of well-known scientists (Ljutov, 2018; Murzina, 2017), which indicates its universality and effectiveness in the study of labor relations. In the end, a comparison of the legal order within the framework of the topic will not only take into account the disadvantages and advantages of each law, but also contribute to the analysis of national characteristics reflected in the law.

The materials of this study are the normative legal acts of the Eurasian Economic Union, as well as its member countries and observer countries.

Results

Despite the fact that not all EAEU countries recognize self-defense as an independent way to protect labor rights, each state contains mechanisms for its implementation. Thus, refusal to work, as the most obvious and effective form of self-defense, is reflected in most of the studied law and order. Such a refusal is most often associated with cases of violations of labor protection requirements, as one of the most important rights of an employee. Prompt response to this violation is the main goal of self-defense. It is

important to note that a number of labor acts of the countries of the Eurasian Economic Union contain guarantees and, in particular, the procedure for implementing self-defense.

The most detailed regulated procedure for the use of self-defense is the Labor Code of the Russian Federation. In addition to the expanded list of cases of refusal to work, Russian legislation contains the limits of the implementation of self-defense, as well as more detailed regulated guarantees and the procedure for its implementation. Nevertheless, the Russian legal regulation of the institute of self-defense by employees of labor rights has a number of significant disadvantages.

None of the studied legislation establishes the concept of self-defense and, as a result, the fundamental signs of self-defense are not defined.

Discussion

In 2006, Russian labor legislation introduced the institutionalized self-defense of employees of their labor rights. This institution was adapted to labor relations and implemented into legislation from criminal law self-defense, as evidenced by the first studies in this area (Koni, 1866: 42–58; Tal, 1918: 178–181). It should be noted that there were no highly specialized labor law studies of self-defense before the introduction of a new method of protecting labor rights in Russian labor legislation. This method of protection was more interesting to civil scientists , who returned to the topic since the middle of the twentieth century (Petrov, 2022: 260). It is important to say that such scientific inattention of labor scientists eventually resulted in a number of normative and legal implementation problems, which will be discussed later (Andrianovskaya, 2022).

As S. Y. Golovina notes, the considered method of protection is of an intersectoral nature (Golovina, 2019), since it is represented not only by labor legislation, but also by civil legislation. In particular, article 12 of the Civil Code of the Russian Federation determines self-defense among other ways of protecting civil rights, which is disclosed in more detail in article 14 of the Civil Code of the Russian Federation. Despite this circumstance, labor law self-defense differs significantly from civil law, which, as it seems, is explained by the specific nature of legal relations.

Unfortunately, chapter 59 of the Labor Code of the Russian Federation does not contain norms with a legal definition of the concept of self-defense, which is a significant mistake of the Russian legislator. Although, scientists spoke about the normative consolidation of such a term already at the end of the 20th century (Golovina, 1998). Today, there are quite a lot of different concepts given by labor scientists (Akulinin, 2018; Gladkov, 2013), but the closest, in our opinion, is the definition of A. A. Andreev. The scientist understands self-defense as ‘an independent legal activity of an employee aimed at restoring a violated right and (or) removing obstacles in its implementation, without contacting the bodies authorized to protect labor rights’ (Ljutov, 2017).

Self-defense can be implemented by the Russian legal order only in cases specified in the law. Russian law order implies three cases when an employee can refuse to perform work:

in case of a delay in payment of wages for more than 15 days (article 142 of the Labor Code of the Russian Federation);

if the work assigned to the employee is not provided for by a labor contract (article 379 of the Labor Code of the Russian Federation);

if the work endangers the life and health of the employee (article 379 of the Labor Code of the Russian Federation). It seems logical to attribute to this category of cases the possibility of an employee to refuse to perform work in violation of labor protection requirements (article 216.1 of the Labor Code of the Russian Federation).

As a specific way of protection, self-defense has a number of key features that, unfortunately, the above definition does not take into account. According to the researchers, such, in particular, are the legally established limits and guarantees for the implementation of this method of protection (Lushnikova, 2012).

Limits imply legally established restrictions that limit the sphere of application of self-defense. Among these limits, it is possible to note the closed list of grounds for the application of the studied method of protecting labor rights, as well as exceptions from it. It seems that such exceptions are mediated by public interest. For example, an employee does not have the right to refuse to perform work

duties during periods of martial law, state of emergency, in organizations directly servicing particularly dangerous types of production, equipment, if the employee is a civil servant and so on in accordance with article 142 of the Labor Code of the Russian Federation.

In order to ensure the implementation of self-defense, the legislator has provided a set of measures aimed at protecting the rights of employees. Among them, we can mention the general guarantee provided for by article 380 of the Labor Code of the Russian Federation, according to which the employer and his representatives have no right to prevent employees from exercising their self-defense of labor rights. It is also possible to single out special guarantees that are contained in individual institutional norms. For example, article 142 of the Labor Code of the Russian Federation provides that during the refuse of work, an employee has the right to be absent from the workplace during his working hours and average earnings are retained for him. It seems that such differentiation of guarantees is conditional, since, despite the dispersed consolidation of the above norms, these guarantees are universal and apply to all cases of self-defense. A kind of guarantee can be considered the order of implementation of self-defense. Analyzing the norms of art. 379, 142 of the Labor Code of the Russian Federation, it can be understood that self-defense is implemented in the order of written notifications, both on the part of the employee and on the part of the employer. Such an order implements not only the procedural function, but also helps to minimize the abuse of the parties to the legal relationship.

It is important to say that the Russian law order has a number of regulatory disadvantages in regulating the institute of labor law self-defense (Andreev, 2016; Khnykin, 2017), as well as clearly insufficient scientific research of the described method of protecting rights. In this regard, guided, among other things, by the need to improve Russian legislation, it seems appropriate to investigate the normative consolidation of self-defense in other legal systems.

To begin with, let's turn to the law and order of the Kyrgyz Republic. In article 398 of the Labor Code of the Kyrgyz Republic, self-defense is called one of the ways to protect labor rights along with state supervision and control bodies, trade unions and other representative bodies. Thus, the law order of Kyrgyzstan isolates the considered method of protection, giving it an independent character.

Institutionally self-defense is not represented in the Labor Code of the Kyrgyz Republic, but a separate case of its application is disclosed in more detail in article 215 of the Labor Code of the Kyrgyz Republic, devoted to the guarantee of workers' rights in labor protection. The specified norm indicates that an employee can refuse to work if there is a danger that clearly threatens his life and health, in connection with the requirements of labor protection. Moreover, such a refusal will not have any legal consequences for the employee, including negative ones. It is important to note that the employee has the obligation to notify the employer about the exercise of the right to refuse work. In addition, the employee retains the average earnings.

There are no other norms in the Labor Code of the Kyrgyz Republic that reveal in more detail the procedure for the implementation of refusal to work as a form of self-defense, which reveals a number of legal issues. For example, why such a mechanism does not apply to other categories of cases, for example, when wages are delayed, the procedure for resuming work by an employee and the procedure for mutual notification of the parties is not fixed.

Next, it is important to consider the legal regulation of self-defense in the Republic of Belarus. There is no concept of self-defense in the Labor Code of the Republic of Belarus, which, as scientists note, carries a number of negative aspects (Skobelev, 2020). Among other ways to protect labor rights, the Labor Code of the Republic of Belarus also does not mention self-defense. Accordingly, there is no need to talk about the development of this institution. Nevertheless, a special case of its application is presented in the legislation. In this case, we are talking about article 223 of the Labor Code of the Republic of Belarus, which, again, is devoted to labor protection. The specified norm grants the employee the right to refuse work in the event of an immediate danger to his life and health and those around him; failure to provide him with personal protective equipment that directly ensures labor safety; refuse and prohibition of work by bodies authorized to exercise control (supervision). Thus, a special case of self-defense is still represented in the legislation of the Republic of Belarus, but has not received its proper development, which would lead to the creation of a successfully functioning institutionalized legal model.

Judicial practice has tried to correct such disadvantages. For instance, the Supreme Court of the Republic of Belarus, in one of its rulings, legitimized the possibility of extending the refusal of work

to other cases not specified by law. In paragraph 17 of the Resolution of the Plenum of the Supreme Court of the Republic of Belarus No. 2 of 29.03.2001 'On certain issues of the application of labor legislation by courts', it is noted that the employee's refusal of work in connection with a transfer carried out in violation of the law is not recognized as truancy. Paragraph 34 of the above resolution is interesting. In this paragraph, the Supreme Court noted that an unauthorized refusal to work will not be considered truancy if the employer, contrary to the law, refused to provide rest days. Thus, the judicial body actually expanded the possibility of self-defense to another case of violation of rights. The position of the law enforcement body of the Republic of Belarus is definitely positive for the potential formation of the studied method of protecting labor rights within the framework of the Union labor legislation.

It is important to say that the institute of self-defense of employees of their labor rights in the Republic of Belarus is developing along the Russian path. According to O.L. Nihaichik, the Ministry of Labor and Social Protection of the Republic of Belarus is developing a decree according to which an employee will be entitled to suspend work in case of a delay in wages for more than fifteen days (Nekhaychik, 2021). Moreover, the procedure for the implementation of this right is proposed to be established similar to what is in effect in the Russian legal order. Nevertheless, as the scientist notes, this innovation, unlike the Russian law and order, does not endow the employee with a key guarantee of self-defense, namely: the average earnings are not retained for the employee in case of refusal of work. Such an approach seems impractical and puts self-defense at a clear disadvantage compared to other ways of protecting workers' labor rights.

Let's turn to the legislation of the Republic of Kazakhstan. Like the Republic of Belarus, the legal order of Kazakhstan also does not directly fix such a way of protecting the rights of workers as self-defense. Nevertheless, the main form of self-defense – refusal to work, is contained in paragraph 19 of article 22 of the Labor Code of the Republic of Kazakhstan, among the basic rights of employees. This norm establishes the right of an employee to stop work in the event of a situation that will be threat to his health or life. In such a case, notification of the direct supervisor or representative of the employer is a necessity. The procedure for sending a notification, as well as going to work, is not legally fixed. It is interesting that the provisions of the above norm are repeated in paragraph 9 of article 137-1 of the Labor Code of the Republic of Kazakhstan, regulating the working conditions for the provision of personnel. It seems that in this way the legislator decided to protect employees who are in atypical labor relations.

In the context of the study of the rule of law of the Republic of Kazakhstan, it is important to note that there are proposals in the academic community aimed at developing the institute of self-defense, both in the state under consideration and in the Russian Federation. For example, scientists propose to expand the cases of refusal to work in the case of discriminatory violations of workers' labor rights (Golovina & Sychenko & Voytkovskaya, 2021).

The Labor Code of the Republic of Armenia recognizes self-defense as one of the independent ways of protecting the labor rights of employees listed in article 38. It seems that the legislator understands any lawful actions aimed at suppressing, protecting and restoring the violated right as ways of protecting labor rights. For example, among the ways to protect labor rights, the legislator, along with self-defense, indicates coercion to perform duties in kind, receiving compensation for damages, recognition of the right, restoration of the situation existing before the violation of the right, etc. Such a list is similar to the Russian civil understanding of self-defense methods, which are listed in article 12 of the Civil Code of the Russian Federation. Nevertheless, such a distinction does not correspond to the understanding of the Russian legislator, who differentiates the ways of protecting labor rights depending on the subject and the procedure for implementing the method of protecting the right. Such an aspect should be separately investigated when forming and integrating common ways of protecting labor rights within the framework of union agreements of the countries of the Eurasian Economic Union.

Let's turn to the rule of law of the EAEU observer states. For example, article 129 of the Labor Code of Uzbekistan establishes the procedure for refusing to work in the event of a threat to the life and health of an employee. The specified norm establishes the employee's right to be absent from the workplace until the elimination of the circumstances that served for the suspension of work. During this period, the average earnings remain for the employee, which by its nature can be attributed to the guarantees of self-defense.

The Labor Code of the Republic of Moldova also provides for the refusal of an employee from work in case of danger to the life and health of the employee. This provision is contained in article 225 of the Labor Code of the Republic of Moldova. This norm establishes a guarantee for such an employee, namely that during the period of self-defense, he cannot be brought to disciplinary responsibility.

Conclusion

Summing up the comparative legal analysis of the legal regulation of the institute of self-defense of labor rights by employees of the participating countries and observer countries of the Eurasian Economic Union, concluding that the goals and objectives specified in the introduction of this study have been achieved, it is worth noting the following. As M. A. Zhiltsov notes, today it is impossible to achieve full-fledged unification of labor-legal models, but it is necessary to strive for this due to labor migration (Zhiltsov, 2022). It is necessary to agree with this statement, but we believe that the legal model of self-defense is a particular example when unification is quite possible. The fact is that, despite the clearly insufficient legal regulation of the institution of self-defense in all the studied legal systems, it has common grounds. Every law and order recognizes, directly or indirectly, self-defense, fixes its most obvious form in the form of refusal to work. As noted above, a number of labor acts of the EAEU countries contain guarantees and, in part, the procedure for implementing self-defense. All these fundamental features are homogeneous, which indicates a common understanding of the essence and legal nature of labor-legal self-defense by the EAEU countries. Moreover, the lack of sufficient legal regulation will contribute to the construction of a single full-fledged legal model that will not contradict the studied method of protection in national legal systems, allowing to avoid legal implementation problems.

The most detailed regulated procedure for the use of self-defense is the Labor Code of the Russian Federation . Thus, when developing self-defense in the labor legislation of the EAEU, it is necessary to rely on the Russian model of self-defense. But the Russian way of protecting labor rights is not perfect either. It seems that the legal regulation of Russian labor self-defense is problematic due to the presence of a structural defect, which consists in an unreasonable arrangement of norms regulating the institution of self-defense[2], as well as the logical incompleteness of the labor-law model. As M. A. Zhiltsov notes, 'with logical incompleteness, there is no thorough elaboration of legal models, that is, when the model of regulation of labor relations created by the rule-making body does not provide for all the possibilities for the development of these relations' (Zhiltsov, 2011: 189–190). Using the example of Russian regulation, this problem is confirmed by both law enforcement practice and the scientific community (Kurennoy, 2015; Knyazeva, 2018). In this regard, relying on the Russian example of regulation of self-defense by employees of their labor rights, it is necessary to take into account the defective character of the Russian legal model.

As part of the unification of the studied method of protecting labor rights, of course, it is worth mentioning the absence of a legal concept of self-defense. Moreover, such problems are characteristic of any of the legislation of the EAEU states described above. The legally fixed concept of self-defense by employees of their rights is very important from the point of view of the application of this method of protection. Thus, the norms of this institute are aimed primarily at specific employees, who for the most part do not have the skills to work with legal texts. In this regard, it is necessary to form a clear idea of the method of protecting rights and the mechanism of its implementation and it is necessary to start with the concept containing the key signs of self-defense. In this case, it is advisable to propose the following legal definition: 'self-defense of labor rights by employees is a legitimate independent activity of an employee to protect labor rights, carried out without contacting the labor rights protection authorities, under the conditions and limits established by agreements and other regulatory acts of the Eurasian Economic Union'. Such a legal definition, which contains the fundamental signs of self-defense, will serve as a starting point for the formation of an institutionalized way of protecting labor rights.

[2] Certificate on the results of the generalization of judicial practice in civil cases on disputes related to the termination of an employment contract at the initiative of the employer, considered by the courts of the Lipetsk region in 2016 (prepared by the Lipetsk Regional Court).

References

Adrianovskaja, T. L. (2022) Samozashshita rabotnikami svoikh trudovykh prav [Self-defense by workers of their labor rights]. *Agrarnoe i zemel'noe pravo*. 4(208), 61–64. (in Russian)

Akulinin, O. G. (2018) Institut samozashshity v trudovom prave [Institute of Self-Defense in Labor Law]. *Trudovoe pravo v Rossii i za rubezhom*. 3, 54–56. (in Russian)

Andreev, A. A. (2016) Samozashshita rabotnika kak sposob zashshity trudovykh prav [Self-defense of an employee as a way to protect labor rights]. *Privolzhski nauchnyi vestnik*. 1, 115–117. (in Russian)

Andreev, A. A. (2017) Aktual'nye problemy trudovogo prava [Current problems of labor law]. Moscow: Prospekt. 493. (in Russian)

Davletgil'deev, R. Sh. (2022) *Trudovoe pravo: natsional'noe i mezhdunarodnoe izmerenie* [Labor law: national and international dimension]. Vol. 1. Moscow: Norma. (in Russian)

Doronina, N. G. & Semiljutina, N. G. & Cirina, M. A. (2021) Znachenie kollizionnogo i sravnitel'nogo metoda issledovaniya dlya pravovogo regulirovaniya nauki i nauchnoi deyatel'nosti [The significance of the conflict-of-laws and comparative research method for the legal regulation of science and scientific activity]. *Mezhdunarodnoe publichnoe i chastnoe pravo*. 2, 13–18. (in Russian)

Gladkov, N. G. (2013) Voprosy povysheniya effektivnosti samozashshity trudovyh prav rabotnikov [Issues of increasing the effectiveness of self-defense of workers' labor rights]. *Trudovoe pravo v Rossii i za rubezhom*. 1, 6–9. (in Russian)

Golovina, S. Yu. & Sychenko, E. V. & Vojtkovskaja, I. V. (2021) Zashshita ot nasiliya i domogatel'stv v sfere truda: vyzovy i vozmozhnosti dlya Rossii i Kazakhstana [Protection from violence and harassment in the sphere of labor: challenges and opportunities for Russia and Kazakhstan]. *Vestnik Permskogo universiteta*. 3, 624–647. (in Russian)

Golovina, S. Yu. (1998) Ponyatiinyi apparat trudovogo prava. [The conceptual apparatus of labor law]. Ekaterinburg. (in Russian)

Golovina, S. Yu. (2019) *Kodifikatsiya rossiiskogo chastnogo prava 2019* [Codification of Russian private law 2019]. Moscow: Statute. (in Russian)

Hnykin, G. V. (2017) Problemy regulirovaniya zarabotnoi platy v sovremennykh usloviyakh [Problems of legal regulation of wages in modern conditions]. *Trudovoe pravo v Rossii i za rubezhom*. 3, 27–30. (in Russian)

Ivankina, T. V. (2015) *Kommentarii k Trudovomu kodeksu RF* [Commentary on the Labor Code of the Russian Federation]. Moscow Norma, INFRA-M, 379–380. (in Russian)

Knyazeva, N. A. (2018) Predely prava na samozashshitu trudovykh prav rabotnikov. *Glagol pravosudiya*. 2 (16), 16–19. (in Russian)

Koni, A. F. (1866) *O prave neobkhodimoi oborony* [On the right of self-defense]. 42–58 (in Russian)

Ljutov, N. L. (2018). Distantsionnyi trud: opyt Evropeiskogo soyuza i i problemy pravovogo regulirovaniya v Rossii [Remote labor: the experience of the European Union and the problems of legal regulation in Russia]. *Lex russica*. 10, 30–39. (in Russian)

Lushnikova, M. V. (2012) Yuridicheskaya konstruktsiya sposobov zashchity trudovykh prav rabotnika [The legal construction of ways to protect the labor rights of an employee]. *Vestnik trudovogo prava i prava sotsial'nogo obespecheniya*. 6. 105–128 (in Russian)

Lushnikov, A. M. (2022). Budushshee evraziiskogo trudovogo prava [The future of Eurasian labor law]. *Trudovoe i sotsial'noe pravo*. 3. 24–26 (in Russian)

Murzina, E. A. (2017) Zashchita trudovykh prav rabotnikov po Rossiiskomu i Kitaiskomu zakonodatel'stvu [Protection of workers' labor rights under Russian and Chinese legislation]. *Lex russica*. 2, 167–179. (in Russian)

Nihajchik, O. L. (2021) *Samozashchita trudovykh prav* [Self-defense of labor rights]. *Gosudarstvo i pravo v XXI veke* [State and law in the XXI century]. Minsk: Belorusskii gosudarstvennyi universitet. 543–546. (in Russian)

Petrov, A. Ja. (2022). *Zashchita trudovykh prav: istoriya, teoriya i praktika* [Protection of labor rights: history, theory and practice]. Moscow: Yurait, 2022. 260. (in Russian)

Reprincev, D. D. (2009). Samozashchita rabotnikami trudovykh prav [Self-defense of labor rights by employees]. *Trudovoe pravo*. 3 (in Russian)

Skobelev, V. P. (2020) O sovremennykh problemakh regulirovaniya mekhanizmov trudovykh prav [On modern problems of regulation of mechanisms of protection of labor rights]. *Trudovoe i sotsial'noe pravo*. 2, 41–45. (in Russian)

Tal', L. S. (1918) *Trudovoi dogovor. Tsivilistichaskoe issledovanie* [Labor contract. Civilistic research], Part 2. Tipografiya Gubernskogo pravleniya. 178–181. (in Russian)

Zhil'cov, M. A. (2011). *Defekty trudovogo prava i sposoby ikh preodoleniya* [Labor law defects and ways to overcome them]. Ekaterinburg. (in Russian)

Zhil'tsov, M. A. (2022) Problemy unifikatsii trudopravovykh konstruktsii evraziiskogo trudovogo prava: teoriya i sudebnaya praktika [Problems of unification of labor law constructions of Eurasian labor law: theory and judicial practice]. *Trudovoe i sotsial'noe pravo*. 3, 27–30 (in Russian)

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Research Article

FUNCTIONS OF LEGAL POSITIONS OF SUPREME FEDERAL COURTS IN LABOR LAW

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Legal positions of supreme federal courts in the Russian Federation have a direct effect on the labor legislation, law enforcement practices, as well as the subject and method of labor law. Certain forms of this influence have not been studied by the science of labor law until recently that results in unlocked theoretical and practical potential for judicial legal positions on labor disputes. To discover the influence of these legal positions on the industry in general, their main functions shall be identified. Through philosophical, general-theoretical and special juridical analysis of academic literature, labor legislation, law enforcement practices, and international legal acts the attributes of the functions of legal positions of supreme federal courts have been identified, the relevant definition has been articulated, the structure of functions has been shown, and specific types of these functions have been discovered. The theoretical structures worked out during the research can be applied in practice as well. On the national level – to solve the problems of platform employment, to ensure a balance in unity and differentiation in labor law, and to improve the mechanism for social partnership. On the international level – for the Eurasian Economic Union member states to solve the problems associated with human resources mobility, protection of working migrants, social partnership, introduction of international labor standards.

Key words: *legal position of the court, Supreme Federal Courts in the Russian Federation, function of law, law enforcement practices, implementation, Court of the Eurasian Economic Union*

Introduction

Many authors have opined about the functions of legal positions, but few have focused on judicial legal positions. Identifying the functions of legal positions of supreme federal courts in the Russian Federation is a relevant problem both for general theory of law and labor law. The legal significance of these functions manifests itself in the subject and method of labor law, labor legislation and law enforcement practices for labor disputes. The international level of the functional impact manifests itself in the fact that the identified functions of legal positions of supreme federal courts in the Russian Federation are models for similar functions fulfilled by the Court of the Eurasian Economic Union in respect to the relations within the Eurasian Economic Union (the relations associated with human resources mobility, protection of working migrants' rights, social partnership, introduction of international labor standards, etc.).

V. M. Baranov and V. G. Stepankov, the scholars representing the science of the theory of state and law, were among the first to present the system and discover the content of functions of the legal positions. Based on the results of the conducted social and legal analysis of the functions of legal positions,

the researchers suggest the following list of them depending on their designated purpose: reflective (or reflecting) – a general state of society's legal system is displayed with legal positions; cognitive (or informational) – knowledge about the law is accumulated and arranged through legal positions; evaluation – it is the legal positions that, being a part of legal consciousness, express the individual's attitude towards the law and legal phenomena in social life; legislative – a legal position serves as a primary source through which all known sources of law are shaped; ideological – legal positions shape the legal culture of society; methodological – the methodological support for law-making and law-enforcement processes is improved with the help of legal positions; the function of legal system federalization – the inconsistencies between federal and regional legislations are eliminated through uniform legal positions and unification of court practices led by the acts of supreme courts is ensured (Baranov & Stepankov, 2003: 47).

More detailed classifications of functions that can be tracked within sectoral sciences are also of interest.

For example, L. V. Vlasenko was one of the first to systematize the functions of legal positions in respect to tax law. In the monograph, the author names the following functions: transformative that is essentially about translating the legislator's will innate to the legal provision regarding the activities of subjects this law-enforcement act is addressed to; the unification function to ensure the uniformity of law-enforcement practices; the function of a source – to fill the gaps in the law; the law-making function due to which a legal position turns into the signal for required amendments (supplements) to the provision and also serves as the primary model for the future provision; law expository – interpretation and explanation of the existing legal provisions (including those to overcome conflicts) (Vlasenko, 2011: 24–36).

O. A. Lukyanova designed a system of legal positions' functions based on their role in the judicial process: 'transmissive: a legal position is a means to transmit the will of subjects; unification: legal positions from acts of law interpretation are aimed at developing uniform enforcement practices; source: legal positions replace the sources of law in case of gaps and conflicts; coordination: organization of activities of subordinate bodies and officials; law-making: a legal position serves as the model for the future legal rule (the function is typical for rule-making legal positions); law expository: legal positions contain explanations for legal provisions' (Luk'yanova, 2013: 102–103).

The problematics of functions of legal positions, including judicial, has never been studied in the science of labor law on a monographic level. However, some attempts have been made to define the functions of court practice.

For example, in one of the first studies dedicated to the role of a court practice in developing labor law conducted by A. K. Bezina (1989), the function of encouraging labor legislation implementation and the informational function were identified. The latter, more specifically, is about 'generation and communication of diverse legal and other social information' (Bezina, 1989: 194–198).

O. S. Kurylyova's 1989 research features the following 'functions of court practices in labor cases: individual sub-statutory regulation of labor relations; a legal directing function; an educational function; a signal and correction function' (Kurylyova, 1989: 63–65).

S. Yu. Golovina addresses the subject of the functional purpose of court practice in respect to establishing a conceptual framework for labor law. For example, the author analyzes the particular impacts of court practices by the Supreme Court in the Russian Federation and the Constitutional Court of the Russian Federation on the conceptual framework of labor law. Ultimately, a conclusion is drawn about the significant role of court practice in generating the conceptual framework of labor law. In particular, the gaps are bridged (lack of a definition or its specific attributes), the terms are specified (estimated specifically), and some definitive provisions are recognized as non-constitutional that characterizes the supervisory function significantly (Golovina, 1997: 102–103).

The 'legally compensative' function of the Supreme Court in the Russian Federation for labor legislation has been examined by V. I. Mironov. In the scholar's opinion, in accordance with this function, the court 'creates new regulatory provisions in the labor law, eliminating the existing gaps' (Mironov, 2006:106).

B. A. Gorokhov, S. P. Mavrin and E. B. Khokhlov in their 2003 research took quite a controversial position in terms of labor law source analysis. For example, the scholars apply the regulating function to all the sources of labor law, classifying court practice as one of them. As the main criterium for classifying a legal act as the source of labor law, the authors name 'a documentary form of judicial legitimization of legal arrangements' (Gorokhov & Mavrin & Khokhlov, 2003: 36–37).

However, the concept of 'documentary form' appears to vary greatly. Specifically, if the case in hand is the comparison of court practice in the context of the Romano-Germanic legal system, to which the Russian legal system belongs. Therefore, a regulating function is typical rather for labor law, while the role of court practice in labor disputes constitutes relaying the legislator's will, law-enforcement and legal direction, but not regulating public relations.

While on the subject of regulating the impact of the court practice on labor relations, the opinion of E. E. Polukhina from her 2010 paper should be mentioned, since she emphasized the 'secondary' and 'derivative' nature of court practice compared to the law. However, as an exclusion, she names the practice of the Constitutional Court of the Russian Federation with its generally binding provisions that allow concluding that it has a regulating function and classifying this practice as a source of labor law (Polukhina, 2010: 49).

Describing the subjects coping with the defects in labor law, M. A. Zhiltsov in his 2010 research allots a significant role to the Constitutional Court in the Russian Federation which, first, recognizes the regulatory provisions as non-constitutional; second, reveals the provisions specifying the content of abstract rules and eliminates antinomies (contradictions); and, third, stating the legal positions and provisions, the Constitutional Court in the Russian Federation eliminates the existing gaps in labor law (Zhil'tsov, 2010: 176).

O. S. Khokhryakova pays especial attention to the structural-functional analysis of decisions of the Constitutional Court in the Russian Federation, naming the legal correction function as fundamental for court practice. The author proves that it is the practices of the Constitutional Court in the Russian Federation that ensure uniform understanding and application of most current provisions of labor legislation (Hohryakova, 2006: 19).

The reflections of T. P. Vedeshkina on the meaning of acts of supreme judicial authorities for labor legislation is also a testimony to at least three functions of legal positions contained in these acts. For example, the scientists note that 'the positions of supreme judicial authorities often eliminate contradictions, bridge the arising gaps to establish a uniform approach to applying and interpreting regulatory provisions' (Vedeshkina, 2022: 49).

In other words, legal positions from the acts of supreme courts, first, correct the meaning of provisions; second, bridge the gaps; third specify the meaning of provisions.

Introduction to the classifications of functions of legal positions and court practice covered by the research of authors representing various branches of law allows several conclusions.

First, even if scholars make an attempt to name the functions of legal positions, they are listed in isolation from the basis of division and without differentiation by the types of legal positions. As a result, the functions of court legal positions as such are not fully covered.

Second, for the same reason, the subject affected by these functions is confused. Eventually, judicial research presents the conclusion that legal positions have an effect on the economic, social and cultural areas of social life, which brings some confusion into the concept of the functions of legal positions.

Third, when the functions are described, the emphasis is not always on the judicial subject of the impact: legislation, law enforcement practices, relations associated with exercising rights and fulfilling obligations, etc.

Fourth, without prejudice against the conducted research, it should be noted that representatives of labor law science have almost never addressed the functions of judicial and legal positions in this area.

Therefore, the **goal** of this research is to identify the main functions of legal positions by the supreme federal courts in the Russian Federation regarding labor law. To achieve this goal, the following **objectives** shall be accomplished:

1) to phrase a definition of the concept 'functions of legal positions by supreme federal courts',
2) to define the structure of these functions,
3) to identify the subject they affect,
4) to name specific functions,
5) to discover the judicial nature of the functions, their theoretical and practical value for the branch.

Based on the results of accomplishing the objective, the following **hypotheses** have been confirmed:

legal positions of supreme federal courts in the Russian Federation have an effect on the subject and method of labor law, labor legislation, law enforcement practices in respect to labor disputes;

legal positions of supreme federal courts in the Russian Federation fulfil five main functions in respect to the subject and method of labor law: an objectification function, a transmissive function, a law enforcement function, a law application function and an interpretative function;

the identified functions of legal positions of supreme federal courts in the Russian Federation are models for similar functions fulfilled by the Court of the Eurasian Economic Union in respect to relations within the Eurasian Economic Union.

Matherials and Methods

In the process of confirming the hypothesis, the following **materials and methods** were used.

The main **materials** in the process of research were: administrative enactments of the Constitutional Court of the Russian Federation and the Supreme Court of the Russian Federation; labor legislation; results of empirical studies of scholars on similar subjects; conventions of the International Labor Organization; the Treaty on the Eurasian Economic Union; administrative and interpretative enactments by the Court of the Eurasian Economic Union and the European Court of Human Rights; labor legislation of the Eurasian Economic Union member states.

Among the **general methods** the following shall be singled out: analysis (when criticizing the functions of legal positions identified in science); synthesis (when composing an authorial definition of 'functions of legal positions of supreme federal courts' based on identified attributes); deduction (when choosing a general research strategy – examination of attributes with a broader scope of concepts with subsequent transition to narrower: function – function of a legal position of a supreme federal court on labor disputes); induction (when extending the analysis results of administrative enactments of supreme federal courts to other acts of these courts); analogies (when studying specific forms the functions judicial and legal positions take to manifest themselves on labor disputes based on the functions of court practice within labor law doctrine); comparison (when comparing the labor legislation of the Russian Federation with the labor legislation of the Republic of Kazakhstan); abstraction (when examining the functional purpose of legal positions of supreme federal courts on labor disputes in isolation from the attributes of the functional purpose of broader categories: legal position, judicial and legal position to avoid the mistakes of other authors); generalization (when summarizing judicial acts on certain problematic law enforcement issues); dialectic method (when substantiating the mechanism for introducing legal positions of supreme federal courts into labor legislation).

Special Methods: a logical method (when comprehending the form of a legal position's existence as syllogisms in judicial acts); a linguistic method (when analyzing the more general category of a 'function' in comparison with the concept of 'a legal position function'); a classification method (when looking for the grounds to divide legal positions into types and to identify these types); a comprehensive approach (when identifying the impact areas of legal positions of supreme federal courts); a structural-functional method (when discovering the structure of a legal position function and when considering the influence of legal positions on the subject and method of labor law); a special juridical method (when identifying defects in labor legislation that could be eliminated by introducing legal positions of supreme federal courts on labor disputes into law); a diachronic approach (with consistent study of the authors' doctrinal views on the court practice function in labor law).

Results

A definition of the concept 'functions of legal positions of supreme federal courts' has been phrased.

The structure of the function of legal positions is established to include three main elements:

1) the legal position contained in an administrative enactment;

2) the impact area (subject) in the form of a subject/method of labor law, labor legislation, law enforcement practices on labor disputes;

3) the result of this impact in the form of dispute settlement, a new regulation, legal provision, or interpretation.

Five functions of supreme federal courts in respect to the subject and method of labor law have been identified.

The judicial nature of these functions has been discovered, so have been their theoretical and practical value for the branch, including for settlement of problems within the Eurasian Economic Union.

Discussion

The discussion on the impact of legal positions of supreme federal courts in the Russian Federation on the labor law should start with analysis of the most general – a philosophical definition of the 'function' concept. Function (*Lat. functio* – performance, fulfillment). In philosophy, function means: '1) activity, responsibility or job; external manifestations of some object's properties in this system of relations; 2) assignment, the role fulfilled by a certain part of the system in relation to the whole' (Prohorov, 1991: 914).

In other words, the functions of a certain phenomenon express the meaning this phenomenon has, its role in the established system. As for the functions, it is necessary to define, on the one hand, the studied phenomenon and to analyze its functions; on the other hand – the subject of the impact of these functions. The subject of the current research addresses:

1) first, the judicial (not economic, social or political) aspect of the issue exclusively;

2) second, the judicial and legal positions (neither law-making nor doctrinal) the functions of which are under consideration;

3) third, the legal system (the field of labor legislation) as the subject of the impact from the identifiable functions (therefore, the impact of the functions extends to every element in the legal system);

4) fourth, the impact of legal positions on all elements of the legal system is reflected upon the subject and method of labor law as a whole.

The first thesis does not require an additional explanation: the legal aspect of the issue is implied when the research addresses the legal position specifically, i.e., the position on law, legal phenomena in social life.

There seems to be so many types of legal positions and judicial legal positions. To conduct the research effectively, it is necessary to outline the framework of the phenomenon the functions of which will be studied. Judicial legal positions are a kind of law enforcement legal positions (along with such legal positions as managerial and administrative). The suggested classification of law enforcement legal positions originates from the division of law enforcement itself into three types – 'judicial, administrative and managerial' (Cherdancev, 2003: 232–233).

The law enforcement legal positions are one of three most global types of legal positions identified by N. A. Vlasenko in accordance with the structure of the legal system. According to a theory by S. S. Alekseev, the structure of a legal system consists of written law (a system of regulatory provisions), legal practice and the legal ideology' (Alekseev, 1995: 83). Therefore, N. A. Vlasenko divided legal positions into law making (a basis of the 'written law'), law enforcement (the basis for 'legal practice') and doctrinal (the basis for 'legal ideology') (Vlasenko, 2008: 80–86).

After separating judicial legal positions from law enforcement and doctrinal positions, the previously presented thesis should be amended since the judicial legal positions themselves can be divided into multiple categories based on certain criteria. One of them is the subject of legal position generation. This paper is dedicated to the legal positions of the supreme federal courts in the Russian Federation. Therefore, the subjects of generation of the legal positions under study are the Constitutional Court of the Russian Federation and the Supreme Court of the Russian Federation. Legal positions of the Supreme Court of Arbitration of the Russian Federation that have previously been in force are not a part of the research, since its generic exclusive jurisdiction has never extended to labor disputes.

Based on the results of the research conducted by the authors mentioned in the introduction of this paper, having conducted a structural-functional analysis of the local legal positions by the supreme federal courts in the legal system of society, the functions of the legal positions in question on labor law specifically should be phrased and revealed.

To start with, the definition of the term 'functions of legal positions of supreme federal courts' shall be phrased – it includes the main areas of their impact on labor and other directly associated relations, labor legislation and law enforcement practices. They also serve to display the place and role of legal positions in the process of law making and legal regulation.

Three main areas of impact ensue from the definition:

1) labor and other directly associated relations;

2) labor legislation;

3) law enforcement practices;

A separate research paper can be written about the impact of judicial legal positions on each identified area. The first area is the subject of labor law. Considering the uniformity of labor law subject and method, the legal positions by the supreme federal courts make a joint impact on them. How exactly?

First, the most obvious function is objectification. Through the judicial legal positions, the subjective needs, interests and attitudes turn into objective, externally expressed activity. The will plays a great role in arranging this activity. Committing an act of will and turning to the court, the subjects of labor law often do not have accurate information on the regulatory provisions their needs, interests and attitudes are based on. Following the provisions of labor law, the court (including the supreme federal court) generates a legal position underlying the judicial decision. Based on this legal position, the decision will be executed, i.e., subjective needs, interests and attitudes of an employee (employer) will be objectified through the externally expressed actions of the individuals to whom this decision is addressed.

The second (transmissive) function directly results from the first one, since generation of a judicial legal position always involves the will of three parties – the legislator, the court and the party to the case. The legislator's will undoubtedly dominates, since both the court and the disputing parties abide precisely by the law. Even in rare cases when a regulatory provision is deemed unconstitutional, most activities of the court and the individuals engaged in the case are built on the current (interrelated material and procedural) statutory provisions, excluding the one considered contradictory to the Russian Federation Constitution. Thus, in the absolute majority of cases, legal positions 'transmit' the legislator's will for its further implementation into the activities of the subjects of labor law. Therefore, the transmissive function of judicial legal positions emerges.

The third function has been already mentioned in the descriptions of the first two. Both objectification and will transmission are tied directly to the exercise of rights. Given that the most critical attribute of a legal position is the direct connection with the legal provisions, the subjects of legal and directly associated relations can abide by the legal positions of the supreme federal courts when exercising their rights on a par with the statutory provisions.

For example, due to the adoption of Ruling No. 32-P of the Constitutional Court of the Russian Federation 'On the Case of Constitutionality Check, P. 1 and 8, Art. 332 of the Labor Code of the Russian Federation Concerning the Claim of Citizen A. A. Podakov' dated July 15, 2022[1], currently (until introduction of amendments into labor legislation), teaching employees belonging to the higher-education teaching personnel and other subjects of law shall be obliged to abide by the legal position from this Ruling when exercising their rights and fulfilling their duties.

Special attention should be paid to the fourth function. Despite all the obviousness of the law nforcement function, it is this one where special impact on the subject and method of labor law manifests itself.

The law in general and labor law in particular are dynamic systems. The changes in the world determine the changes in labor law: its subject and method. One of challenges in today's labor law is expansion of its subject.

Specifically, nowadays, the science of labor law addresses the problem typical for post-industrial society: expanding the area of sectoral standards, extending the labor law area to new public relations (Chucha, 2022: 118).

For example, the problem of so-called 'platform employment'. It is worth specifying for better understanding that platform employment is the interaction between the organization receiving orders, the subcontractor and the customer through a special network aggregator (platform). Examples of such platforms are SberMarket, Yandex.Eda, Taxi Gett, etc.

The problem is that the existing definition of labor relations secured in Art. 15 of the Russian Federation Labor Code does not consider these forms of employment, the very trilateral structure of relations, as

[1] Decision of the Constitutional Court of the Russian Federation of 15.07.2022 No. 32-P On the case of checking the constitutionality of parts of the first and eighth articles 332 of the Labor Code of the Russian Federation in connection with the complaint of citizen A. A. Podakov.

well as the procedure of interaction between parties, including manifestations of the 'employer's' power via network aggregators. This implies the actual lack of proper regulation of the relations close to labor, but without property, social and other guarantees for the 'employees' (subcontractors).

The law enforcement function of legal positions of supreme federal courts in this case acquires a strictly practical direction, since in the absence of legal regulation of the aforementioned relations, the legal position of a supreme federal court may turn into that example that will be applied in practice until the relevant legislative defects are eliminated.

For example, the powers of the Russian Federation Constitutional Court set forth in Art. 125 of the Russian Federation Labor Code, as well as in Art. 79 of the Federal Constitutional Law 'On the Constitutional Court of the Russian Federation' allow a broad interpretation of Art. 15 of the LC of RF: to determine that several individuals may mean 'employer'; that management and supervision may be performed via artificial intelligence, rating algorithms, etc.; that a specific type of work may be assigned by the third party (consumer); that compliance with the internal regulations does not mean abiding by a certain local act, but can manifest itself through the shift schedules in an electronic app instead, etc.

Additionally, the Russian Federation Constitutional Court should specify that the subcontractor's registration as a self-employed worker paying taxes on the received income may not serve as a factor excluding emergence of labor relations, since currently the platforms use this legal conflict to avoid the signs of labor relations.

In other words, setting up the broadest interpretation of the definition from Art. 15 in the Russian Federation Labor Code currently in effect, the Russian Federation Constitutional Court can create a disputable presumption of existing labor relations with a transfer of the burden of proof to the customer organization (platform), which, on the one hand, shall help many citizens protect their rights and, on the other hand, shall encourage the legislator to prepare the long-awaited changes.

There is also another possible way to solve the problem of platform employment – also through the law enforcement function of legal positions by supreme federal courts. Specifically, the Russian Federation Constitutional Court can extend the validity of provisions in Chapter 53.1 of the Russian Federation Labor Code on private agencies to platform employment relations. In this model of legal relations, the platform serves as a private employment agency. And management and supervision (using artificial intelligence and rating algorithms as well) are performed by the host party (consumer) in whose interests the subcontractor provides the service (does the work).

The impact of the law enforcement function of legal positions on the method of labor law is also undoubted. For example, one of specific features of the labor law method is unity and differentiation of the established rights and responsibilities of subjects in labor relations (Skachkova, 2003: 242). The aforementioned unity and differentiation are established by statutory provisions, but they can be also specified by the legal positions of the supreme federal courts. A similar thought is mentioned in the research of some scholars (Diveeva, 2008: 17; Shtivel'berg, 2004: 9).

Examples of acts containing these legal positions are:

Resolution of the Plenum of the Russian Federation Supreme Court No. 1 dated January 28, 2014[2] – in respect to the issues of applying legislation regulating the labor of women, individuals with family obligations and minors;

Resolution of the Plenum of the Russian Federation Supreme Court No. 21 dated June 2, 2015[3] – in respect to the issues of applying the legislation regulating the labor of the head of an organization and members of the collective executive body;

Resolution of the Plenum of the Russian Federation Supreme Court No. 52 dated November 24, 2015[4] – in respect to the issues of applying the legislation regulating the labor of athletes and coaches.

A similar influence confirmed by examples of legal positions can be found in respect to such a specific method of labor law as social partnership in the field of labor. The existence of this method has not yet

[2] Resolution of the Plenum of the Supreme Court of the Russian Federation of 28.01.2014 No. 1 'On the Application of Legislation Regulating the Work of Women, Persons with Family Duties and Minors.

[3] Resolution of the Plenum of the Supreme Court of the Russian Federation of 02.06.2015 No. 21 'On Certain Issues Arising from the Courts in the Application of Legislation Regulating the Work of the Head of the Organization and Members of the Collegial Executive Body of the Organization'.

[4] Resolution of the Plenum of the Supreme Court of the Russian Federation of 24.11.2015 No. 52 'On the application by the courts of legislation regulating the work of athletes and coaches'.

been recognized on the level of the labor law doctrine, but it has been confirmed in the papers of many eminent representatives of the academic community (Lushnikov, 2004: 11, 23; Lushnikova, 1997: 245).

The viewpoints of the aforementioned authors are confirmed, among other things, by the legal positions contained in:

Resolution No. 38-P of the Russian Federation Constitutional Court dated December 7, 2017[5] (on the issue of legal regulation of a regional minimum wage agreement, specifically: the validity of the agreement in respect to the workers of the organizations financed from the federal budget);

Resolution No. 26-P of the Russian Federation Constitutional Court dated June 3, 2021[6] (on the issue of dismissing the head of the elected collective body of the primary trade union organization without discharging from the main employment based on the grounds provided for by cl. 2, P. 1, Art. 81 of the Russian Federation Labor Code regardless of the decision by a superior elected trade union body on the disagreement with this dismissal before the judicial decision made on the basis of the employer's application comes into effect to recognize the aforementioned decision by the superior elected trade union as unjustified);

Judgment No. 37-KG14-4 by the Judicial Chamber for Civil Cases of the Russian Federation Supreme Court dated September 5, 2014[7] (on the issue of a pregnant woman exercising the right to reject the previously achieved dismissal agreement per cl. 1, P. 1. Art. 77 of the Russian Federation Labor Code).

The fifth function is interpretative. The impact of legal positions by the supreme federal courts on the subject of labor law through law enforcement is inextricably intertwined with interpretative activity. Interpretation takes place both parallel to the application of law and separately from the latter (in the acts of the Russian Federation Constitutional Court). Examples of the interpretative function of the legal positions under study are all the acts of supreme federal courts. For example, only in Resolution No. 2 of Plenum of the Russian Federation Supreme Court dated March 17, 2004,[8] can one find examples of legal positions with literal interpretation of provisions (the absolute majority of legal provisions); broad interpretation (cl. 25 of the Resolution) and restrictive interpretation (cl. 15 of the Resolution).

Due to the interpretation, labor relations are either specified or, vice versa, are generalized. The issue of labor law provision interpretation and its respective impact on the subject may require several studies. All the more so since there are even some statements in science about special 'labor law hermeneutics' (Amel'chenko, 2010; Tishkovich, 2015).

The identified functions have their potential not only on the national level, but on the level of international associations as well. In particular, the examined functions of legal positions very well may manifest themselves in the activities of the Court of the Eurasian Economic Union.

Due to historical, socio-economic, political and other reasons, the dominant legal tradition of the Eurasian Economic Union (hereinafter – EAEU) member states is legal positivism. Therefore, practical issues arising during social development can be regulated exclusively by introducing the relevant amendments into the legislation, which implies a legislative process comprising several stages, the first of which is the legislative initiative. Among all the legal grounds for amending the current legislation, the following shall be identified: standards of international law contained in international treaties; standards of domestic law in the country – member state of a certain international organization taken as a model by another country; legal positions of international judicial authorities.

The first group of standards is usually put into effect through ratification. Examples here are conventions of the International Labor Organization ratified by all the EAEU member states (On Freedom of Association

[5] Decision of the Constitutional Court of the Russian Federation of 07.12.2017 No. 38-P 'On the case of checking the constitutionality of the provisions of Article 129, parts of the first and third articles 133, parts of the first, second, third, fourth and eleventh articles 133.1 of the Labor Code of the Russian Federation in connection with the complaints of citizens V. S. Grigorieva, O. L. Deidey, N. A. Kapurina and I. Ya. Kurash'.

[6] Decision of the Constitutional Court of the Russian Federation of 03.06.2021 No. 26-P 'On the case of checking the constitutionality of part three of article 374 of the Labor Code of the Russian Federation in connection with the complaint of citizen E. K. Sergeeva'.

[7] Determination of the Judicial Collegium for Civil Cases of the Supreme Court of the Russian Federation dated 05.09.2014 No. 37-KG14-4.

[8] Resolution of the Plenum of the Supreme Court of the Russian Federation of 17.03.2004 No. 2 'On the Application of the Labor Code of the Russian Federation by the Courts of the Russian Federation'.

and Protection of the Right to Organize – No. 87; On Rural Workers' Organizations and Their Role in Economic and Social Development – No. 141; On Tripartite Consultation (International Labor Standards) – No. 144, etc.) (Golovina & Lutov, 2016: 64).

The second group of standards does not have a definite mechanism for 'borrowing' legal structures from the domestic legislation of another country. However, there is no prohibition on such use of standards as the model, as confirmed by the relevant examples. Specifically, the Law of the Republic of Kazakhstan 'On Introducing Amendments and Supplements into Certain Legal Acts of the Republic of Kazakhstan on Labor Issues' dated May 4, 2020[9], according to which employers shall be obliged to create conciliatory commissions the legal status and functional purpose of which are similar to the status and purpose of the commissions on regulating social and labor relations from Art. 35 of the Russian Federation Labor Code. Moreover, based on a systematic interpretation of Art. 3 and Art. 5 of the Treaty on the Eurasian Economic Union (on principles of cooperation, equality, transparency; on mutually approved and well-coordinated policy) such a form of legislative material exchange is a priority.

The third group includes the legal positions that become statutory provisions resulting from the introduction procedure, although no longer of international law, but of legal positions. It is difficult to find any examples of integration of the legal positions of international courts into the Russian labor legislation. The closest examples are the Resolution of the European Court of Human Rights dated March 22, 2012 that was never implemented by Resolution No. 27-P of the Russian Federation Constitutional Court dated December 6, 2013. Similarly, there are no implemented legal positions of the EAEU Court.

That said, analysis of law enforcement and interpretative acts of the EAEU Court (resolutions, decisions, advisory proceedings) have shown the high potential for the mechanism for introducing its legal positions into Russian legislation. The introduced legal positions will be able to perform all five aforementioned functions. It appears reasonable for EAEU member states to work out stared legal positions and to introduce them into legislation on the most problematic issues related to human resources mobility, protection of working migrants' rights, social partnership, introduction of international labor standards, etc. The development of the procedure for introducing legal positions of the EAEU Court with their subsequent ratification by the Russian Federation Constitutional Court is a promising mechanism for improving Russian labor legislation.

Conclusion

Based on the results of the conducted research, the issue of the functional purpose of legal positions of supreme federal courts in the Russian Federation on labor disputes has been examined comprehensively for the first time. First, the impact areas of the legal positions under study have been identified: labor and other directly associated relations; labor legislation; law enforcement practices on labor disputes. Second, the signs of functions of legal positions have been identified and revealed and a definition of the concept 'functions of legal positions of supreme federal courts' has been phrased on their basis. Third, five functions of legal positions of supreme federal courts in the Russian Federation in respect to the subject and method of labor law have been identified and revealed: an objectification function, a transmissive function, a law enforcement function, a law application function and an interpretative function. To exemplify the impact of legal positions of supreme federal courts on labor and other directly associated relations in respect to labor disputes, the variants of the legal positions' impact on the platform employment for settling practical problems have been modeled. Also, from the view of practical purposes, it was proven that the functions of judicial legal positions are applicable not only on the national level, but on the international as well (as exemplified by EAEU Court activity).

References

Alekseev, S. S. (1995) *Teoriya prava* [Theory of law]. Moscow: BEK. (in Russian)

Amel'chenko, M. N. (2010) *Germenevtika trudovogo prava Rossii i Germanii* [Hermeneutics of labor law of Russia and Germany]. Saint Petersburg: Saint Petersburg State University. (in Russian)

[9] Law of the Republic of Kazakhstan of May 04, 2020 No. 321-VI ZRK 'On Amendments and Additions to Certain Legislative Acts of the Republic of Kazakhstan on Labor Issues'.

Baranov, V. M. & Stepankov, V. G. (2003) *Pravovaya pozitsiya kak obshcheteoreticheskii fenomen* [Legal position as a general theoretical phenomenon]. Nizhny Novgorod: Nauka. (in Russian)

Bezina, A. K. (1989) *Sudebnaya praktika v mekhanizme pravovogo regulirovaniya trudovykh otnoshenii* [Judicial practice in the mechanism of legal regulation of labor relations]. Kazan: Izdatel'stvo Kazanskogo universiteta. (in Russian)

Cherdancev, A. F. (2003) *Teoriya gosudarstva i prava* [Theory of State and Law]. Moscow: Yurait. (in Russian)

Chucha, S. Yu. (2022) Predmet trudovogo prava v postindustrial'nom informatsionnom obshchestve i doktrina trudovykh pravootnoshenii [Subject of labor law in the post-industrial information society and the doctrine of labor legal relations]. *Vestnik Omskogo universiteta* [Herald of Omsk University], 2, 117–120. (in Russian)

Diveeva, N. I. (2008) *Teoreticheskie problemy individual'nogo pravovogo regulirovaniya trudovykh otnoshenii* [Theoretical problems of individual legal regulation of labor relations]. Saint Petersburg: Saint Petersburg State University. (in Russian)

Golovina, S. Yu. (1997) Rol' sudebnoi praktiki v formirovanii ponyatiinogo apparata trudovogo prava [The role of judicial practice in the formation of the conceptual apparatus of labor law]. *Vestnik Omskogo universiteta* [Herald of Omsk University], 3, 100–103. (in Russian)

Golovina, S. Yu., & Lyutov, N. L. (2016) *Mezhdunarodnye trudovye standarty i rossiiskoe trudovoe pravo: perspektivy koordinatsii* [International labor standards and Russian labor law: prospects for coordination]. Moscow: Norma. (in Russian)

Gorohov, B. A. & Mavrin, S. P. & Hohlov, E. B. (2003) Istochniki trudovogo prava i istochniki pravovogo regulirovaniya obshchestvenno-trudovykh otnoshenii [Sources of labor law and sources of legal regulation of social and labor relations]. *Pravovedenie* [Jurisprudence], 6, 30–47. (in Russian)

Hohryakova, O. S. (2006) Pravovye pozitsii Konstitutsionnogo suda RF i ikh znachenie dlya primeneniya trudovogo zakonodatel'stva i zakonodatel'stva sotsial'nogo obespecheniya [Legal positions of the Constitutional Court of the Russian Federation and their significance for the application of labor and social security legislation]. *Voprosy trudovogo prava* [Labor Law Issues]. 9, 19. (in Russian)

Kurylyova, O. S. (1989) *Sudebnaya praktika i sovershenstvovanie trudovogo zakonodatel'stva* [Judicial practice and improvement of labor legislation]. Minsk: Nauka i Tekhnika. (in Russian)

Luk'yanova, O. A. (2013) Funktsii i rol' pravovykh pozitsii v yuridicheskom protsesse [Functions and role of legal positions in the legal process]. *Aktual'nye problemy pravovedeniya*, 39, 102–103. (in Russian)

Lushnikova, M. V. (1997) *Pravovoi mekhanizm sotsial'nogo partnerstva v regulirovanii trudovykh i sotsial'no-obespechitel'nykh otnoshenii: sravnitel'no-pravovoe issledovanie* [Legal mechanism of social partnership in the regulation of labor and social security relations: comparative and legal study]. Moscow: Lomonosov Moscow State University. (in Russian)

Lushnikov, A. M. (2004) *Teoreticheskie problemy individual'nogo pravovogo regulirovaniya trudovykh otnoshenii* [Theoretical problems of individual legal regulation of labor relations]. Moscow: Moscow State Legal Academy. (in Russian)

Mironov, V. I. (2006) *Praktika noveishego trudovogo zakonodatel'stva* [Practice of the latest labor legislation]. Moscow: Delo. (in Russian)

Poluhina, E. E. (2010) *Effektivnost' pravovogo regulirovaniya trudovykh i inykh neposredstvenno svyazannykh s nimi otnoshenii i sudebnaya praktika* [Effectiveness of legal regulation of labor and other relations directly related to them and judicial practice]. Moscow: Ekoonis. (in Russian)

Prohorov, A. M. (ed.) (1991) *Bol'shoi entsiklopedicheskii slovar'* [Great Encyclopedic Dictionary]. Moscow: Norint. (in Russian)

Shtivel'berg, F. B. (2004) *Osnovaniya i predely differentsiatsii trudovogo prava Rossii* [Grounds and Limits of Differentiation of Russian Labor Law]. Yekaterinburg: Ural State Law University. (in Russian)

Skachkova, G. S. (2003) *Rasshirenie sfery deistviya trudovogo prava i differentsiatsii ego norm* [Expansion of the scope of labor law and differentiation of its norms]. Moscow: MGIU. (in Russian)

Tishkovich, K. S. (2015) Mekhanizm tolkovaniya norm trudovogo prava [Mechanism of interpretation of labor law]. *Herald of Omsk University*. 43 2, 14–21. (in Russian)

Vedeshkina, T. P. (2022) Unconventional labor law sources: a concept and types. *Russian juridical journal*. 1, 47–55. (in Russian)

Vlasenko, N. A. (2008) Pravovye pozitsii: ponyatie i vidy [Legal positions: concept and types]. *Journal of Russian Law*. 12, 80–86. (in Russian)

Vlasenko, L. V. (2011) *Nalogovye pravovye pozitsii sudov: teoriya i praktika* [Tax legal positions of the courts: theory and practice]. Moscow: Norma. (in Russian)

Zhil'cov, M. A. (2010) *Defekty trudovogo prava* [Defects of labor law]. Ekaterinburg: Izd-vo UGTU-UPI. (in Russian)

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Research Article

FEATURES OF THE LEGAL REGULATION OF LABOR MIGRATION IN THE CIS STATES AT THE PRESENT STAGE OF SOCIAL DEVELOPMENT

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The article discusses the legal framework for regulating labor migration in the Commonwealth of independent states (hereinafter referred to as the CIS). Particular attention is paid to the definition of 'labor migration' in the legal literature, international legislative documents and agreements about labor migration within the CIS. The author analyzes the UN Convention 'On the Protection of the Rights of All Migrant Workers and Members of Their Families', the ILO Migration for Employment Convention No. 97 (Revised), 1949, and the Agreement between the CIS states 'On the protection of labor migrants and members of their families', as well as individual intergovernmental agreements between the CIS states, some legislative acts of the CIS states. He defines the essence and features of the legal regulation of labor migration in the CIS states at the present stage of social development. At the conclusion the author presents his opinion regarding the definition of the term 'labor migration' and the ways of legal regulation of labor migration within the CIS.

Key words*: labor migration, labor migrant, labor activity, foreign citizen, convention, agreement*

Introduction

Today, one of the important global issues that need to be addressed all over the world is the regulation of migration processes due to the movement of people in order to use abandoned lands, develop productive forces, form and study cultures, languages and peoples. Population migration as a complex social process affects almost all areas of the social and political life of peoples around the world, playing an important role in the history.

According to the report of the International Organization for Migration for 2020, the number of migrants in the world is estimated at 281 million people. 2/3 of them are labor migrants[1].

With this in mind, at the initiative of the UN, on December 10, 2018, a new document was adopted – the Global Compact for Safe, Orderly and Regular Migration[2]. This agreement is advisory, and its main objectives and implementation are in line with the 2030 Agenda for Sustainable Development, where special attention is paid to the national independence of states.

[1] World Migration Report 2020. Available at: https://www.un.org/development/desa/pd/sites/www.un.org.development.desa.pd/files/imr2020_10_key_messages_en_1.pdf [Accessed 8 July 2022].

[2] Global Compact for Safe, Orderly and Regular Migration, December 10, 2018. Available at: https://refugeesmigrants.un.org/migration-compact [Accessed 8 September 2022].

The rights of migrant workers and members of their families in states of employment must be ensured by providing adequate access to employment, health care, housing and education on an equal basis with citizens of those countries. These issues are clearly are a part of the most important social rights protected by international human rights and labor treaties.

Materials and Methods

The basis of the methodology in preparing the article was a comparative analysis of international acts on labor migration: acts of the UN, ILO, agreements concluded by the CIS states. The involvement of statistical data made it possible to show the problems in this area and propose changes to the legislation on labor migrants. These changes are intended to protect the rights of such people and their families.

Discussion

The CIS states after their independence faced the problem of a sharp migration flow of people from one state to another, the number exceeded several million people. The main part of the migrating population remained for permanent residence, or was engaged in temporary labor activity. Starting from that period, the CIS states needed to regulate labor migration processes, both in states of migrants outflow and in receiving states. Over the past 20 years, migration has become one of the significant phenomena of the CIS states with a significant impact on all areas of the life: economic, social, political, demographic.

Based on this, today the migration processes regulation, especially of labor migration, is important for the CIS states. Some CIS states: Tajikistan, Uzbekistan and Kyrgyzstan have a young population structure. There is an increase in population and, accordingly, in the labor force in these countries. For example, the annual population growth in Tajikistan averages 2.2%[3]. Tajikistan ranks first in the region in terms of population growth. According to statistics, an average of 500,000 citizens leave Tajikistan every year for labor migration[4].

Labor migration of citizens of the CIS states mainly occurs within the CIS. The main countries receiving labor migrants within the Commonwealth are the Russian Federation and the Republic of Kazakhstan.

The COVID-19 crisis has shown that there are serious problems in the regulation of labor migration and that there exists the problem of inequality in social protection of migrants. Labor migrants accessing social protection (in comparison with citizens of the states of employment) face additional obstacles that are of a theoretical and practical nature. In our opinion, many of these problems arise precisely because the legal status and the legal stay of labor migrants are still not paid enough attention to, both at the legislative level and in science in general.

In this context, there are also questions about the terminology and definitions content used in the scope of labor migration. In the scientific legal literature, labor migration has many names: ‘labor migration’, ‘external labor migration’, ‘foreign labor’. The relations arising with these workers are referred to as ‘relations with the participation of foreign elements’, similar in content to ‘international labor market’, ‘international labor exchange’, ‘international movement of labor resources’.

Legislation contains the terms ‘labor migration’ and ‘external labor migration’, but it does not provide clear criteria for what is meant by labor migration and who is it, although the term migrant worker is often used in both national and international law.

It is no coincidence that in the literature this is often paid attention to. For example, it is noted that the definitions of ‘migrant’, ‘migration’ still remain unsettled, the concepts of ‘migrant worker’ and ‘foreign worker’ are not agreed upon (Khabrieva, Andrichenko, Eleonsky 2004: 754).

Among scientists there are different opinions regarding the definition of the concept and the legal essence of labor migration. According to I.Ya. Kiselev, external labor migration (international labor) is labor relations complicated by a foreign element. At the same time, a foreign element can be present both in the subject composition (the subject of the relationship is a foreign worker or a foreign employer) and

[3] Population Growth in Central Asian Countries. Available at: https://www.mir-geo.ru/centr-aziya/nasel/prir-nase [Accessed 9 April 2022].

[4] Labor Market in Tajikistan//Statistics Agency under the President of the Republic of Tajikistan, 2017. Available at: https://www.stat.tj/ru/ [Accessed 4 September 2022].

in the object composition (the work of an employee takes place abroad, although the participants in the relationship may belong to the same state) (Kiselev, 1997: 13).

V. E. Rybalkin sees external labor migration as the movement of labor from less developed countries to economically developed countries for temporary work with subsequent return to their homeland (Rybalkin, 2000: 150). Z. A. Ikrami disagrees with the definition of external labor migration given by V. E. Rybalkin. In his opinion, at present labor resources are moving both between developed and developing countries (Ikrami, 2007: 11).

V. A. Iontsev, focusing on the purpose of movement, defines international labor migration as legal work in the country of entry for a certain period of time (from 1 day to several years), after that this migrant returns to the country of departure (Iontsev 1999: 308).

Z. A. Ikrami defines external labor migration (international labor migration) as the interstate movement of a person in order to perform temporary labor activity in the country of entry and receiving remuneration for his work during the work permit period of validity (Ikrami, 2007: 12), and also as an independent form of international socio-economic relations associated with the crossing of the state border by the labor force, a certain urgency of movement, remuneration of migrants in the country of entry and the intention to return to their homeland (Ikrami, 2007: 11).

Labor migration is estimated by many authors as entirely voluntary migration (Moskvin, 1995: 34). It seems that labor migration is always or almost always a forced migration, because the homeland country is idle in production, there are not enough jobs, or because of low wages that cannot satisfy the basic needs of a person or of a family.

There is also no consensus in the designation of the person – labor migrant. For example, G. S. Skachkova suggests using the term 'migrant worker' to designate this person (Skachkova, 2006: 264). Others prefer the term 'foreign worker'. Z. A. Ikrami considers it more correct not to use the above terms, but to use the term 'migrant worker', since it can be applied not only to the employees, but also to other persons engaged in any labor activity (Ikrami, 2007: 11). Referring to the international law and international acts, Yu. V. Zhiltsova also sees it appropriate to choose the term 'migrant worker' (Zhiltsova, 2011: 18). In her opinion, it is incorrect to use the term 'foreign worker' in the legislation, since the Labor Code understands an employee as a person who has entered into an employment relationship with an employer, i.e. entered into an employment contract.

In accordance with Art. 2 of the UN Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, the term 'migrant worker' means 'a person who will be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national'[5] and his work is not limited to employment.

Many authors suggest it is expedient to include in the content of 'labor migration' the implementation of labor activity, both within the framework of labor contracts and civil law contracts. In their opinion, this makes it possible to regulate labor migration more correctly, since labor performed under an employment contract within the framework of civil law agreements needs legal protection. For example, Yu.V. Zhiltsova considers it necessary to replace the term 'labor activity', which the legislation defines as the work of a foreign citizen on the basis of an employment contract or a civil law contract about work or services, with the term 'activity on the basis of an employment contract or civil legal contract about work or services. In her opinion, the term 'labor' is more labor than universal in nature; accordingly, the use of the term 'labor activity' as such a broad concept seems illogical (Zhiltsova, 2011: 18).

In our opinion, Art. 2 of the International Convention 'On the Protection of the Rights of All Migrant Workers and Members of Their Families', is not applicable to all persons who are migrant workers. This rule, when referring to a migrant worker engaged in a remunerated activity other than work under an employment contract, also indicates the nature of the work performed by the migrant worker, as a rule, 'on his own', which may not apply to the work performed in under civil law contracts. In this case, self-employment, which provides a migrant worker with the means for his subsistence, includes entrepreneurial activity. The independent nature of entrepreneurial activity indicates the Civil Code

[5] International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families. Available at: https://www.ohchr.org/en/instruments-mechanisms/instruments/international-convention-protection-rights-all-migrant-workers [Accessed 15 September 2022].

of the Republic of Tajikistan[6]. In accordance with Art.1 of the Civil Code of the Republic of Tajikistan, 'entrepreneurial activity is an independent activity carried out at one's own risk, aimed at systematically obtaining profit from the use of property, the sale of goods, the work or the provision of services by persons registered as such in the manner prescribed by law'.

'Systematic profit' should be understood as the regular extraction of profit (income).

Citizens have the right to engage in entrepreneurial activities without forming a legal entity (Art. 24 of the Civil Code of the Republic of Tajikistan). This means that entrepreneurial activity includes not only the work or services under civil law contracts, but also goods production and sale, which, in fact, is carried out by an individual entrepreneur independently, and not depends on the conclusion of labor or civil law contracts.

Therefore, we consider it expedient to include in the content of 'labor migration' the implementation of entrepreneurial activities without the formation of a legal entity.

Based on the foregoing, in order to fully cover the concept of 'labor migration' and specify it legally, the following definition seems appropriate: 'Labor migration is a temporary change in the place of residence of a person for the purpose of engaging in paid activities in a foreign state'. This wording must be used in the legislation of the CIS states. At the same time, it is necessary to distinguish between the area of civil and labor law in relation to migrant workers.

In accordance with art. 2 of the Universal Declaration of Human Rights, 1948 'everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind...'. In addition, 'no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs...'[7]

The special nature of the Universal Declaration norms is in the realization of these rights, not conditioned either by citizenship or non-permanent residence in a certain territory. The possibilities of their restriction are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society (Part 2, Art. 29 of the Universal Declaration of Human Rights).

ILO Migration for Employment Convention (Revised), 1949 (No. 97) defined a migrant for employment as a person who migrates from one country to another with a view to being employed otherwise than on his own account and includes any person regularly admitted as a migrant for employment (art. 11)[8]. The UN Convention 'On the Protection of the Rights of All Migrant Workers and Members of Their Families' defines the concept of a 'migrant worker' as a person who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national (art. 2). It also includes in the concept of 'migrant worker' entities engaged in paid activities both on the basis of labor and civil law contracts, as well as remunerated activities carried out personally or jointly with the family.

On the territory of the CIS states, including the Republic of Tajikistan, the Agreement between the CIS member states dated April 15, 1994 'On the protection of labor migrants and members of their families' is in force[9]. For the purposes of this Agreement, the term 'migrant worker (or worker)' means a person with permanent residence in the Party of departure who is lawfully engaged in a paid activity in the Party of employment (art. 2). From the content of the norms of the Agreement, it is assumed that the term 'labor migration' covers only activities carried out under an employment contract. In particular, the Agreement regulates the main areas of cooperation of the Parties in the field of labor activity and social protection of persons and members of their families who permanently reside in the territory of one of the states of the Parties and carry out their labor activities at enterprises, institutions, organizations of all forms of ownership in the territory of another state Party in accordance with the law. In addition, Art. 2 of the Agreement also considers the term 'Party of Employment' as a state where a migrant worker carries out his labor activity on the terms of an employment contract. The term 'working conditions' is also used here as a set of factors of the working environment that affect the health and performance of a person in the

[6] Akhbori Majlisi Oli of the Republic of Tajikistan. 1999. No. 6. Art. 153.

[7] Universal Declaration of Human Rights. Available at: https://www.ohchr.org/en/human-rights/universal-declaration/translations/english [Accessed 14 September 2022].

[8] Migration for Employment Convention (Revised), 1949 (No. 97). Available at: https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C097 [Accessed 14 Sepetmber 2022].

[9] Interparliamentary Assembly of the CIS Member States. 1997. No. 2. P. 3–7.

process of work, including the working hours and rest time length, holidays, remuneration in accordance with the labor legislation of the Party of employment.

Art. 6 of the Agreement deals with the form, content and termination of an employment contract between a migrant worker and an employer.

The nature of labor migration based on an employment contract is also indicated by many international treaties of the Republic of Tajikistan. For example: Agreement of May 4, 2006 between the Government of the Republic of Tajikistan and the Government of the Republic of Kazakhstan 'On labor activity and protection of the rights of migrant workers, citizens of the Republic of Tajikistan temporarily working on the territory of the Republic of Kazakhstan, on labor activity and protection of the rights of migrant workers, citizens of the Republic Kazakhstan temporarily working on the territory of the Republic of Tajikistan'[10] applies to persons permanently residing on the territory of the Party of departure who are legally engaged in paid labor activity on the territory of the state of the Party of employment (Art. 1). Although this article does not indicate an employment contract, nevertheless, it is precisely about labor activity on the basis of an employment contract that we are talking about, which is expressly provided for in Part 1 of Art. 6 of the Agreement: 'The labor activity of a migrant worker is carried out on the basis of an individual labor agreement (contract) concluded with the employer in one or more languages, in accordance with the legislation of the Party of employment'. The same wording exists in the Agreement of May 6, 1998 between the Government of the Republic of Tajikistan and the Government of the Kyrgyz Republic 'On labor activity and social protection of migrant workers'[11]. But these international treaties contain a mention that the persons falling under the scope of these agreements are migrant workers.

It should be noted that the Agreement of October 16, 2004 between the Government of the Republic of Tajikistan and the Government of the Russian Federation 'On labor activity and protection of the rights of citizens of the Republic of Tajikistan in the Russian Federation and citizens of the Russian Federation in the Republic of Tajikistan'[12], which determines persons to whom this act extends. They are persons engaged in temporary labor activity in accordance with: a) contracts for the work or services concluded between legal entities or individuals of the host state, legal entities of the state of permanent residence – employers for the employee (referred to as contracts for the work); b) civil law contracts for works (services), concluded by them with customers of works (services) of the host state; c) employment contracts concluded by them with the employer of the host state.

It is this provision that makes it possible to regulate labor migration more correctly, since labor carried out under an employment contract and within the framework of civil law agreements also needs legal protection.

In scientific literature, this type of labor migration is called differently: 'commercial migration', 'shuttle migration' and is characterized by the most massive type of economic migration. Commercial migrants conduct trading business abroad, buying goods in other countries and bringing them for resale for profit. Commercial migrants can hire workers or involve their relatives or other people on a gratuitous or paid basis. A characteristic feature of commercial migrants is the informal nature of their activities: as a rule, they are engaged in trading business without registration with state services. But, unfortunately, its legal definition has not been formulated, therefore, this definition is absent in the agreements within the CIS and, accordingly, in the national legislation of the CIS states.

On this issue, the reason for judgment is the problem on determining the legal status of migrant workers engaged in individual entrepreneurship. Such cases take place in the regulation of the labor activity of migrant workers by the Agreement of May 4, 2006 between the Government of the Republic of Tajikistan and the Government of the Republic of Kazakhstan 'On labor activity and protection of the rights of migrant workers, citizens of the Republic of Tajikistan temporarily working on the territory of the Republic of Kazakhstan, on labor activity and protection of the rights of migrant workers, citizens of the Republic of Kazakhstan, temporarily working on the territory of the Republic of Tajikistan'[13]. According to the Art. 2 of the Agreement, self-employed persons are not recognized as migrant workers. This means that migrant workers – citizens of the Republic of Tajikistan, who are actually individual entrepreneurs and

[10] Akhbori Majlisi Oli of the Republic of Tajikistan. 2006. No. 10. Art. 440.
[11] Decisions of the President and Government of the Republic of Tajikistan. 1998, May.
[12] Decisions of the President and Government of the Republic of Tajikistan. 2004, October.
[13] Akhbori Majlisi Oli of the Republic of Tajikistan. 2006. No. 10. Art. 440.

are mainly engaged in wholesale and retail trade in the markets, were left out. They were not given the status of a migrant worker and they could not use the benefits and the registration procedure established for migrant workers in the Republic of Kazakhstan. Of course, a self-employed migrant worker is not an employee. However, as proceeds from the norms provided for by civil legislation and practice, the work performed by a migrant worker who is engaged in individual entrepreneurship is not limited within the framework of civil law agreements. Therefore, it is necessary to attribute persons engaged in entrepreneurial activities without forming a legal entity to migrant workers. Consequently, is necessary to take it into account and give the status of migrant workers to these persons in the international agreements of the CIS. All migrant workers need protection, not just employees who have concluded an employment contract or perform one-time work under civil law agreements.

As is known, the basic documents of international organizations are of great importance to national legislation, since when forming a national policy of intercountry labor migration, the norms of ratified international conventions should be taken into account. The most vulnerable in this process are family members of labor migrants, including children and minors. The legal regulation of this issue at the international level and by countries receiving migrants has not yet been fully ensured.

In particular, children migration is not a new phenomenon, it has a long history. According to the latest global estimate by the UN Children's Fund, the total number of migrant children has reached about 31 million[14]. This number represents the total number of migrants under the age of 18 who were born in foreign countries and do not have the citizenship of these countries. However, there are still no accurate statistics on the country from which they migrated, the duration of their migration, their legal status and other information about them.

Based on this, both the UN Convention and the ILO Convention on the Rights of Migrant Workers relate to the legal status of members of their families. In particular, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families has defined the concept of 'family member'. According to article 4 of the UN Convention, the term 'members of the family' refers to persons married to migrant workers or having with them a relationship that, according to applicable law, produces effects equivalent to marriage, as well as their dependent children and other dependent persons who are recognized as members of the family by applicable legislation or applicable bilateral or multilateral agreements between the States concerned. Similar definitions of 'a family member of a labor migrant' are contained in the Agreement on Cooperation in the Field of Migration and Social Protection of Labor Migrants within the CIS.

For example, according to Art. 30 of the UN International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families of December 18, 1990, 'every child of a migrant worker has the fundamental right to education, together with a national of the host country. Their admission to state preschool educational institutions or schools cannot be limited or prohibited due to the lack of a permanent status'. Unfortunately, family members of labor migrants often face problems of access to social services: education, treatment, employment during their stay in the host countries. Most of the CIS states do not take into account the requirements of international documents regarding the legal status of migrant family members, especially children and minors, in the legal regulation of migration by national legislation.

Intergovernmental agreements between the CIS states about labor migration do not always regulate the legal status of members of the families of labor migrants. For example, intergovernmental agreements of the Russian Federation with other CIS countries, in particular with the Republic of Kyrgyzstan[15], the Republic of Uzbekistan[16] and the Republic of Tajikistan[17], do not contain rules regarding the legal status of members of families of migrant workers.

[14] UNICEF, 2018b. Available at: https:www. unicef. org/reports/annual-report-2018 [Accessed 10 September 2022].

[15] Agreement between the Government of the Russian Federation and the Government of the Kyrgyz Republic on labor activities and social protection of migrant workers of March 28, 1996. Available at: http://base.spinform.ru/show_doc.fwx?rgn =4880 [Accessed 5 May 2022].

[16] Agreement between the Government of the Russian Federation and the Government of the Republic of Uzbekistan on the organized recruitment of citizens of the Republic of Uzbekistan for temporary labor activity on the territory of the Russian Federation of April 5, 2017. Available at: https://ria.html17498069806898.ru [Accessed 5 May 2022].

[17] Agreement between the Government of the Republic of Tajikistan and the Government of the Russian Federation on labor activity and protection of the rights of citizens of the Republic of Tajikistan and citizens of the Russian Federation in the Republic of Tajikistan of October 16, 2004. Available at: http: www.adlia.tj [Accessed 12 May 2022].

Such gap in these agreements during the stay of family members of labor migrants, especially children and minors from the CIS states, has led to many problems in the Russian Federation and the Republic of Kazakhstan. For example, children and spouses of labor migrants who do not work do not have legal grounds to stay on the territory of the Russian Federation for more than 90 days. Labor migrants are forced to issue work permits for their spouses for their family members to stay for more than 90 days and prevent violations of the law, as well as pay monthly taxes for non-existent activities. For migrants, these unexpected financial costs are significant.

This factor led to the failure to ensure the rights of children of labor migrants to education. When children of labor migrants are admitted to preschool institutions and schools in the Russian Federation, preschool and educational centers require registration of migrant children during the entire academic year, while, according to the legislation of the Russian Federation, registration of children of labor migrants is granted only for up to 90 days.

Conclusion

The comparative analysis of the relationship between the status of a migrant worker in international and national law shows a number of questions that are of a theoretical and practical nature. So, the CIS states, or in general, the states with the most intensive migration exchange, in our opinion, should strive to harmonize migration legislation, primarily in terms of regulating the legal status of migrants, as well as to unify key legal terms, such as 'migrant', 'migrant worker', 'refugee', 'forced migrant'.

We also consider it necessary, when developing and concluding international treaties within the framework of the CIS in the field of migration, to mandatory provide for a legal mechanism for ensuring the rights of labor migrants to social security: accounting for work experience, conditions and procedure for pension insurance, the mechanism for pension exporting, social benefits during the period of labor migration, as well as providing medical services, access to housing and education for labor migrants and their family members.

It is necessary to take into account in international treaties of the CIS about labor migration the legal status of family members of labor migrants and include in them the right to family reunification of migrant workers, the possibility of staying family members of a labor migrant in a foreign state for the period of labor migrants' labor activity.

When developing international conventions within the CIS about labor migration, in order to cover all labor migrants, it is necessary to include the following types of work and labor activity of labor migrants, in accordance with:

a) contracts for the work or services concluded between legal entities or individuals of the host state, legal entities of the state of permanent residence – employers for the employee (referred to as contracts for the work);

b) civil law contracts for works (services), concluded by them with customers of works (services) of the host state;

c) employment contracts concluded by them with the employer of the host state;

d) rules of the employment state to engage in individual entrepreneurship.

References

Ikrami, Z. A. (2007) *Pravovye aspekty trudovoi migratsii v Rossiiskoi Federatsii i v respublike Tadzhikistan (sravnitel'naya kharakteristika)* [Legal aspects of labor migration in the Russian Federation and in the Republic of Tajikistan (comparative characteristics)]. Dushanbe. (in Russian)

Iontsev, V. A. (1999) *Mezhdunarodnaya migratsiya naseleniya: teoriya i istoriya izucheniya* [International population migration: theory and history of study]. Moscow: Dialog-MGU. (in Russian)

Khabrieva, T. Ya. & Andrichenko, L. V. & Eleonsky, V. O. (2004) *Kontseptsiya razvitiya migratsionnogo zakonodatel'stva* [The concept of the development of migration legislation]. *Kontseptsii razvitiya rossiiskogo zakonodatel'stva* [Concepts of the development of Russian legislation]. Moscow: Gorodetz, 754–756. (in Russian)

Kiselev, I. Ya. (1997) *Mezhdunarodnyi trud* [International work]. Moscow: Jurist. (in Russian)

Moskvin, L. & Potemkina, O. (1995) Migratsionnye protsessy v SNG [Migration processes in the CIS]. *Social and political journal*, 1, 34–45. (in Russian)

Rybalkin, V. E. (2000) *Mezhdunarodnye ehkonomicheskie otnosheniya* [International economic relations]. Moscow: Biznes-shkola 'Intel-Sintez', Diplomaticheskaya akademiya MID RF. (in Russian)

Skachkova, G. S. (2006) *Trud inostrantsev v Rossii: pravovoe regulirovanie* [Labor of foreigners in Russia: legal regulation]. Moscow: Wolters Cluver. (in Russian)

Zhiltsova, Yu. V. (2011) Problemy otraslevoi prirody zakonodatel'stva o primenenii truda inostrannykh grazhdan v RF [Problems of the sectoral nature of legislation on the use of labor of foreign citizens in the Russian Federation]. *Labor law in Russia and abroad,* 1, 18–20. (in Russian)

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