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SUSPENDING THE ACTION OF LABOUR AGREEMENT DURING THE PERIOD OF MARTIAL LAW IN UKRAINE

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The purpose *of the article is to study a concept and a procedure for suspending the action of labour agreement during the period of martial law in Ukraine.* ***Research methods:*** *the method of comparative and documentary analysis, as well as the method of documentary synthesis and generalization. Together with the methods of objective truth and the cognitive-analytical method, a conclusion on the peculiarities of legal regulation of labour relations during the period of martial law in Ukraine is formulated.* ***Results:*** *the key differences between termination of labour relations by terminating the action of labour agreement, a downtime and suspending the action of labour agreement during the period of martial law in Ukraine were characterized and revealed.* ***Discussion:*** *the provisions of the Law of Ukraine "On Organization of Labour Relations under the Conditions of Martial Law" N 2136-IX dated March 15, 2022, which at present occupies a key position in the sphere of regulation of suspending the action of labour agreement during martial law in Ukraine, were reviewed and analysed, as well as practice of the Supreme Court of Ukraine on this issue.*

Key words: *labour relations; labour agreement; the employer; the employee; termination of the action of labour contract; suspension of the action of labour contract; a downtown; martial law.*

Problem statement and its relevance. The beginning of a war and introduction of martial law in Ukraine became a challenge for each of us and forced the legislator to react accordingly by making the urgent decisions in each of the branches of law. The branch of labour law is one of those that has undergone the greatest changes, which still require the detailed interpretation and are the cause of lively discussions among theoreticians and practitioners. Issues of regulating the labour relations in modern realities in the context of hiring and dismissing the employees still remain in the focus of attention not only of the lawyers, but also of the direct participants of labour relations. Ensuring and protecting the rights and freedoms of the employee and the employer determine the relevance of theme of our research.

The study of this issue was partially carried out by V.S. Venediktov, S.V. Vyshnovetska, O.O. Kovalenko, Yu.M. Burnyagina, O.M. Yaroshenko, O.A. Yakovlyev and others. But, unfortunately, at present this issue is still not properly researched. At the same time, it creates an opportunity for further discussion and researches.

Presentation of basic material of the research. In connection with the military aggression of the russian federation against Ukraine, the martial law was introduced in the territory of Ukraine by the Decree of the President of Ukraine № 64/2022 starting at 05:30 of February 24, 2022 for a period of 30 days [1]. Since that date, the martial law in Ukraine has already been extended several times by the relevant Decrees of the President of Ukraine. In particular, on November 8, 2023 the Verkhovna Rada of Ukraine adopted as a whole the draft Law on the approval of the Decree of the President of Ukraine "On Extending the Period of Martial Law in Ukraine" dated November 6, 2023 № 734/2023,

according to which the period of martial law in Ukraine was extended from 05:30 of November 16, 2023 for another 90 days [2].

During the period of martial law in Ukraine a number of regulatory and legal acts were adopted, changing the regulation of labour relations operated in peacetime. Despite the fact that the Labour Code of Ukraine [3] occupies a key position in the hierarchy of labour law (with the exception of the Constitution of Ukraine), today, during the period of martial law, one should be guided by the Law of Ukraine "On Organization of Labour Relations under the Conditions of Martial Law" № 2136-IX dated March 15, 2022 (hereinafter – the Law № 2136-IX).

The first thing to pay attention to is Part 2 of Article 1 of the Law № 2136-IX stipulating that "for the period of martial law restrictions on the constitutional rights and freedoms of a person and a citizen provided for by Articles 43 and 44 of the Constitution of Ukraine are introduced" [4]. However, both of the mentioned articles of the Constitution of Ukraine are important in the context of protecting the rights and freedoms of the employee, because they warn against their abuse by the employer.

The legal possibility to limit the constitutional rights and freedoms of a person and a citizen is provided for in Article 64 of the Constitution of Ukraine [5], however, it is not clear how and to what extent restriction of these rights is permissible during the period of martial law. We consider the wording of Part 2 of Article 1 of the Law № 2136-IX as incorrect, because it could be perceived by the employers literally as permission to dismiss the employees under any conditions. In addition, taking into account the unsatisfactory level of trust in the judiciary, as well as the insufficient level of awareness in the field of labour law, we could predict that a part of the illegally dismissed employees will not go to the court, because the employer has an "iron" argument in the form of Part 2 of Article 1 of the Law N 2136-IX.

Before moving on to the specifics of procedure for dismissing the employees during the period of martial law in Ukraine, it is worth recalling the general procedure for terminating the labour relations. Article 36 of the Labour Code of Ukraine defines a considerable list of non-exhaustive grounds for terminating the labour relations with the employee, which, in general, are divided into two main groups:

1) at the initiative of the employee;

2) at the initiative of the employer [3].

A procedure for terminating the labour agreement at the initiative of the employee depends on a number of circumstances, including:

1) a type of the labour agreement (the labour agreement concluded for an indefinite period of time or the fixed-term labour agreement);

2) the subjective circumstances arising for the employee who decided to dismiss, for example: change of residence; care of a minor child or a child with physical/sensory and/or other disorders, etc. (a non-exhaustive list of such circumstances is consolidated in Part 1 of Article 38 of the Labour Code of Ukraine) [3]. Also, one should not forget about such reason for dismissal as the manifestation of a desire, which does not necessarily have to be supported by a specific life circumstance, because working is not the obligation, but the right, provided for in the above-mentioned Article 43 of the Constitution of Ukraine [5].

In comparison with the employee, the employer has a more formal list of grounds for terminating the labour relations, because the mere presence of such desire on the part of the employer is not a sufficient reason. Despite this, the Labour Code of Ukraine defines a wide list of such grounds. Analysing the provisions of Article 40 of the Labour Code of Ukraine we could separate the following classification [3]:

1) a specific action or inaction of the employee, which in its content is a violation of the terms of the labour agreement, job duties, internal regulations of the enterprise, institution or organization, as well as the labour legislation in force at the time of such actions/inaction;

2) the objective circumstances that do not depend on the employee, for example: reorganization/liquidation of the enterprise; reduction of the number or staff of the employees according to Paragraph 1 of Part 1 of Article 40 of the Labour Code of Ukraine. Here it is worth paying attention to Part 3 of Article 40 of the Labour Code of Ukraine, which makes it impossible to dismiss the employee at the initiative

of the employer during the period of his/her temporary incapacity, as well as during the period when the employee is on vacation. However, its effect does not extend to Paragraph 5 of Part 1 of Article 40 of the Labour Code of Ukraine, as well as in case of complete liquidation of a legal entity. The peculiarities of settlement of the issue on termination of labour relations with certain categories of the employees (the top managers, the employees who serve values of various kinds or who provide an educational function, etc.) are determined by Article 41 of the Labour Code of Ukraine and are referred to as additional grounds for terminating the labour agreement.

Besides a restriction of the constitutional rights and freedoms of the employee, Article 13 of the Law № 2136-IX introduces a novelty in the field of labour law in the form of the term "suspending the action of labour agreement" [4]. At the same time, the effective Labour Code of Ukraine does not contain any mention of such term and its Final Provisions only inform that the Law of Ukraine "On the Legal Regime of Martial Law" dated May 12, 2015 № 389-19 provides limitations and peculiarities in regulation of labour relations, which are defined by the Law № 2136-IX [6]. The lack of mention and interpretation of the term "suspending the action of labour agreement" in the Labour Code of Ukraine is due to the fact that such option is available only during the period of martial law, which follows directly from the provisions of Article 13 of the Law № 2136-IX.

A concept and a procedure for suspending the action of labour agreement is defined in Article 13 of the Law № 2136-IX. Thus, a suspending the action of labour agreement means the temporary termination by the employer of providing the employee with work and the temporary termination by the employee of performing the work under the concluded labour agreement in connection with the military aggression against Ukraine, which excludes a possibility of the both sides of the labour relations to fulfil the obligations stipulated in the labour agreement (Part 1 of Article 13) [4].

Suspending the action of labour agreement could be carried out at the initiative of one of the parties of the labour agreement for a period not longer than the period of martial law.

A procedure for the action of labour agreement at the initiative of the employee involves writing by him/her an application to suspend the action of labour agreement. The employer considers and registers such application, makes sure that it could not provide the employee with work due to the state of war in Ukraine. In the event that there is an opportunity to provide work, but the employee could not perform it, the employer informs on impossibility to suspend the action of labour agreement in the absence of a legal basis. Writing an application by the employee is required only if suspending the action of labour agreement during the period of martial law is initiated by the employee himself/herself. If such suspension is proposed by the employer, there is no need for such application. On the part of the employer, it is sufficient to issue an order on suspending the action of labour agreement, which, in particular, states information on the reasons for such suspension, including the inability of the both parties to perform their duties and the method to exchange the information, the period of suspending the action of labour agreement, the number, categories and surname, first name, patronymic (if available), registration number of the taxpayer's registration card or series and number of passport (for individuals who, due to their religious beliefs, refuse to accept the registration number of the taxpayer's registration card and have notified the relevant supervisory authority and have a relevant mark in the passport) of the relevant employees, the conditions for the renewal of the labour agreement.

In the case of a decision to cancel suspending the action of labour agreement until the termination or cancellation of martial law, the employer should notify the employee of the need to start work 10 calendar days before the resumption of the employment contract. Suspending the action of labour agreement does not entail the termination of the labour relations.

So, the military aggression against Ukraine, which makes it impossible for the employer to provide the employee with specific type of work determined by the labour agreement and, accordingly, the impossibility of its performance by such employee is the main ground, the presence of which gives the right to suspend the action of labour agreement at the initiative of the employee and/or the employer. The key issue remains to proof the impossibility to fulfil the obligations of the parties, that is quite disputing matter. In

addition to the impossibility to provide and perform the work, other reasons could be indicated in the order to suspend the action of labour agreement. However, in our opinion, detailing all the reasons could be evidence to refute the main one, if such order is a subject matter of a labour dispute.

If the employee does not agree with the order to suspend the action of labour agreement or believes that such order violates his/her rights, he/she could apply to the central executive body that implements the state policy on supervision and control of compliance with the labour legislation, or to its territorial body personally or entrust the appeal to the trade union of the enterprise, institution or organization where he/she works. Based on the results of its review, such central executive body in agreement with the military administration could issue an order and oblige the employer to cancel the relevant order or eliminate the violation in another way within 14 working days from the moment of receiving the order. In turn, the employer has the right to appeal to the court to challenge such order (Part 3 of Article 13 of the Law № 2136-IX) [4].

We offer to consider the Decision of the Darnytskyi District Court of Kyiv dated March 20, 2023 in case № 753/14486/22, the subject matter of the dispute in which was the order of JSC "Ukrzaliznytsya" dated April 1, 2022 № 389/os on suspending the action of labour agreement from April 1, 2022 with the defendant, who held the position of deputy director of the Procurement Department [7]. In the adopted decision, the court refers to the commentary of the Ministry of Economy of Ukraine to Law № 2136-IX [8] and draws attention to the importance of proving by the defendant "the absolute impossibility of the employer to provide work and the employee to perform it" [7]. In particular, the court drew attention to the facts that confirm the employer's ability to provide the plaintiff with work: 1) the plaintiff had a desire and an opportunity to perform the work provided for in the labour agreement and he did not show an initiative to suspend the action of labour agreement; 2) JSC "Ukrzaliznytsya" continued its work and the Procurement Department, where the plaintiff worked, functioned in the period from April 1, 2022 to August 31, 2022; 3) in the specified period there was a growth in the number of the employees; 4) the defendant did not provide any evidence that could confirm the legality of the order to suspend the action of labour agreement.

The Ministry of Economy of Ukraine in its commentary to the Law № 2136-IX expressed its opinion on the definition of "absolute impossibility" and noted that suspending the action of labour agreement is possible if the production, organizational, technical capabilities, means of production, or the employer's property that are necessary to perform a work by the employee are destroyed in the result of hostilities or their functioning is impossible for objective and independent reasons from the employer [8].

Earlier, we focused on the fact that a presence of the military aggression of the russian federation against Ukraine covers the entire territory of the country, while at the same time, active hostilities are local. In view of this, we share an opinion of the Ministry of Economy of Ukraine and believe that conducting the active hostilities on the territory where the enterprise, institution, organization is located, or the consequences that remained after and could not be eliminated in a short time, is a basis for implementation of the provisions of Article 13 of the Law № 2136-IX.

Here we should pay an attention to the innovations of labour legislation, namely the amendment of Part 1 of Article 41 of the Labour Code of Ukraine by paragraph 6 on the basis of Law of Ukraine № 2352-IX dated July 1, 2022 "On Amendments to Certain Legislative Acts of Ukraine on Optimizing the Labour Relations" [9], as well as to the practice of the Supreme Court of Ukraine.

Case № 523/11673/22, which reached the cassation hearing, is illustrative in this matter, where the Supreme Court of Ukraine put an end to the disputed legal relations and issued the Resolution dated September 27, 2023. According to the circumstances of the case, the subject matter of the lawsuit was reinstatement to the previously held position by cancelling the order on dismissal and payment of wages for the period of the forced absenteeism. The lawsuit was satisfied by the decision of the Suvorovskyi District Court of Odesa. The defendant filed an appeal, but the appellate instance agreed with the decision made by the court of the first instance. The Supreme Court of Ukraine drew an attention to the fact that applying the paragraph 6 of Article 41 of the Labour Code of Ukraine is possi-

ble only when the result of hostilities is the complete destruction (absence) of conditions, means and property that are necessary to perform a work. The fact of the imposition and existence of martial law is common knowledge and it is not a sufficient ground for dismissal, which fully confirms our position, which was stated above. The fact that the enterprise does not actually functioning and/or could not provide safe working conditions is not a reason for dismissal under paragraph 6 of Article 41 of the Labour Code of Ukraine.

During the consideration of the defendant's cassation appeal, the Supreme Court of Ukraine substantiates its position by referring to the fact that at the time of the plaintiff's release, the territory of the city of Odessa was not occupied and no hostilities were conducted there, which is confirmed by the List of territories on which hostilities are (were) conducted or temporarily occupied by the russian federation, approved by the Order of the Ministry of Reintegration of the Temporarily Occupied Territories of Ukraine № 309 dated December 12, 2022 [10].

In order to protect and prevent the violation of the employee's rights and in the event that the employer decides to dismiss the employee on the specified grounds, such employee should be convinced and the employer should prove (or be ready to prove) the cause-and-effect relationship between the impossibility to provide a work and hostilities. This will provide an opportunity for the employee to identify its invalidity in the absence of such communication even during the review of the order on dismissal.

Since the Law № 2136-IX is temporary and its effect extends to labour relations only during the period of martial law in Ukraine, we believe that the possibility to suspend the action of labour agreement should remain in force even after the cancellation of martial law for the following reasons.

Firstly, from the moment of cancellation or termination of martial law in Ukraine, the effect of certain normative legal acts that regulate labour relations during the period of marital law will be automatically stopped, which anyway will cause a chaos in regulation of such legal relations, despite the fact that the temporary effect of the normative legal acts adopted during the period of martial law is generally known and is explicitly stated in their provisions. In order to return to our usual life and to regulate the post-war labour relations properly, we should need so-called "adaptation" period. In our opinion, failure to introduce such "adaptation" period will lead to a number of illegal dismissals, violating not only the constitutional provisions, but also the guarantees consolidated in Article 5-1 of the Labour Code of Ukraine.

Secondly, according to the research of the NGO "OPORA", more than 8 million of Ukrainians are now abroad (as of June 2023) [11]. Since suspending the action of labour agreement does not establish any additional restrictions, the employee has the right to leave Ukraine, provided that he/she does not fall under the restrictions on leaving, which are established during the period of martial law. Of course, we could not predict for sure how many citizens will decide to return to Ukraine and go to work after the renewal of the labour agreement, however, we are sure that even if such number is minimal, such persons could not have time to return to the Motherland and start his/her work within the 10-day period specified by the employer, and to hope for the loyalty of the employer is not an adequate protection and prevention of violation of the employee's rights. Also, it is worth remembering that citizens who decide to return to Ukraine should resolve all bureaucratic and procedural issues in the host country, which will also take a considerable amount of time.

Not all categories of the employees have the right to suspend the action of labour agreement during the period of martial law in Ukraine. In particular, this option could not be applied to the heads and deputy heads of state bodies, as well as local self-government officials who hold elected positions (paragraph 4 of Part 1 of Article 13 of the Law N 2136-IX) [4].

The right of the mobilized employees to suspend the action of labour agreement during the period of martial law in Ukraine should be mentioned separately [12]. According to Article 36 of the Labour Code of Ukraine one of the grounds to terminate the labour agreement is conscription or entry of the employee or the employer – a natural person to military service, referral to alternative (non-military) service, except when the employee's place of work or position is kept in accordance with the Part 3 of Article 119 of the Labour Code of Ukraine [3]. Part

3 of Article 119 of the Labour Code of Ukraine establishes guarantees for the mobilized employees under the conditions of a special period in the form of preserving the place of work and the position specified in the labour agreement. Article 1 of the Law of Ukraine "On Defence of Ukraine" dated December 6, 1991 № 1932-XI defines a special period as a period that begins from the moment of the announcement of the decision on mobilization (except for the targeted one) or its delivery to the executors regarding covert mobilization or from the moment of the introduction of martial law in Ukraine or in some of its localities and covers the time of mobilization, wartime and partially the reconstruction period after the end of hostilities [13].

Paragraph 4 of Article 13 of the Law № 2136-IX defines that compensation of wages, guarantee and compensation payments to the employees during suspending the action of labour agreement is fully entrusted to the state carrying out the military aggression against Ukraine [4]. To do this, the employer should continue to keep records in terms of determining and recording the amounts of wages and compensation payments that would be due to the employee if there was no such suspension. Thus, at the request of the employee or on its own initiative, the employer could issue to the employee the corresponding certificate on the accrued amounts of wages and compensation payments that would have been due to the employee if such suspension had not occurred.

Considering this issue, we should point our attention on criteria that distinguish a downtime, determined by Article 34 of the Labour Code of Ukraine, from suspending the action of labour agreement during the period of martial law in Ukraine:

a) the grounds for implementation (a downtime is any circumstance that led to suspending the work; suspending the action of labour agreement is the absence of work and its performance by the employee during the period of martial law);

b) a duration (a downtime could last without a time limit as long as there are circumstances on the basis of which it was introduced; suspending the action of labour agreement is possible only during the period of martial law);

c) a subject of making the decision (the employer makes its decision on dismissal; the initiator of suspending the action of labour agreement could be both the employer and the employee);

d) a circle of persons to whom the corresponding decision applies (a downtime could be introduced for the entire enterprise or concrete department or concrete employee; suspending the action of labour agreement is individual in nature, that is, a separate order is adopted for each employee);

e) a payment (during downtime no less than 2/3 of the tariff rate of the employee's grade (salary) is paid and a downtime due to the employee's fault is not paid; when the action of labour agreement is suspended, the salary is not paid);

e) the insurance length of service (in case of payment of a downtime by the company, the period of its validity is included in the employee's insurance length of service; in case of suspending the action of labour agreement, the employee's insurance length of service is not counted) [3; 4].

Conclusions. The war significantly affected the labour law sphere and regulation of relations between the employee and the employer. Grounds for termination of labour relations have not fundamentally changed from those that operated in peacetime, although their list has expanded. The introduction of martial law led to the adoption of the Law № 2136-IX, which today occupies a key position in the field of regulation of labour relations. Despite the restrictions established by the Law № 2136-IX (in particular, regarding the constitutional rights and freedoms of the employee), it also provides for the possibility to suspend the action of labour agreement, which does not entail the termination of labour relations.

To implement such option, two mandatory conditions should be met: 1) the absolute impossibility to provide work by the employer and the impossibility to perform work by the employee; 2) such impossibility is in a cause-and-effect relationship with hostilities.

Thus, it is impossible to suspend the action of labour agreement when the employer could not provide the employee work in the result of hostilities, on the contrary, the specified circumstances could serve as an additional reason for dismissal in accordance with Paragraph 6 of Part 1 of Article 41 of the Labour Code of Ukraine. Taking into account the objective circumstances, it is advisable to establish an "adaptation" period and extend the possibility to suspend the action of labour agreement even

after the end of period of martial law, as well as increase the deadline for the employee's return to work.

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ПРИЗУПИНЕННЯ ДІЇ ТРУДОВОГО ДОГОВОРУ У ПЕРІОД ВОЄННОГО СТАНУ В УКРАЇНІ

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Метою *статті є вивчення поняття та порядку призупинення дії трудового договору у період воєнного стану в Україні.* ***Методи дослідження:*** *метод порівняльного та документального аналізу, а також метод документального синтезу та узагальнення. Разом із методами об'єктивної істини та пізнавально-аналітичним методом сформульовано висновок щодо особливостей правового регулювання трудових відносин у період воєнного стану в Україні.* ***Результати:*** *охарактеризовано та розкрито ключові відмінності між припинення трудових відносин шляхом розірвання трудового договору, простоєм та призупиненням дії трудового договору у період воєнного стану в Україні.* ***Обговорення:*** *розглянуто та проаналізовано положення Закону України «Про організацію трудових відносин в умовах воєнного стану» від 15 березня 2022 року № 2136-IX, який на сьогодні займає ключову позицію у сфері регулювання призупинення трудового договору під час дії воєнного стану в Україні, а також практику Верховного суду України з даного питання.*

Ключові слова: *трудові відносини; трудовий договір; роботодавець; працівник; припинення дії трудового договору; призупинення дії трудового договору; простій; воєнний стан.*

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