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BANKRUTCY AND DISMISSAL OF EMPLOYEES: NATIONAL AND FOREIGN EXPERIENCE

БАНКРУТСТВО ТА ЗВІЛЬНЕННЯ ПРАЦІВНИКІВ: НАЦІОНАЛЬНИЙ ТА ЗАРУБІЖНИЙ ДОСВІД

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Annotation. *The bankruptcy procedure in Ukraine has undergone significant changes due to the challenges posed by the imposition of martial law and the need to bring legislation in line with EU standards. One of the key indicators of the country's economic situation is the number of bankruptcy proceedings. In the recent past, the pandemic, and now a full-scale war, have had a devastating impact on business entities, thereby affecting business activity and prospects for entrepreneurship. However, in order to restore their solvency or be recognized as bankrupt, it is necessary to apply the appropriate tools provided by the Code of Ukraine on Bankruptcy Procedures (hereinafter referred to as the Bankruptcy Code).*

The analysis of national bankruptcy legislation provides grounds to highlight a "pro-creditor" vector, particularly the focus on protecting the rights and interests of creditors. The institute of bankruptcy is also considered from the perspective of the social and economic interests of the state and society, as the liquidation of a debtor entails both positive and negative aspects. In a market environment, those who have better organized their business activities and have quality management tend to have an advantage. Negative social elements of bankruptcy include employee layoffs, increased unemployment, and so on.

The participants in a bankruptcy case (insolvency) also include the representative of the debtor's employees. In the event of the bankruptcy of a company, obligations concerning wages that employees should receive for work (services) performed during the period preceding bankruptcy or liquidation of the company are fulfilled in accordance with the legislation. In particular, payments of wage arrears to employees who are/were in an employment relationship with the debtor are satisfied in the first place.

In most foreign countries, the institution of bankruptcy is applied to restore the solvency of entities, including the revitalization and development of the country's economy. The consequence of such a procedure is an improvement in the living standards of its citizens.

Keywords: *bankruptcy, debtor, creditor, dismissal of employees, employer, business entity, labor relations.*

The methodological basis of the research is a compilative analysis of the problem, in particular through a comprehensive analysis of norms of civil, business, economic, labor and international law.

The purpose of the article is to determine the peculiarities of the legal regulation

of the dismissal of employees during the bankruptcy procedure through the analysis of international, regional (European) and national norms.

Different countries use different institutional technologies for social control of business. At the same time, an important task of the international and European legal systems is the unification of legal norms. And as for the employees of this or that enterprise as a business entity, legal foundations have been created at the international level to protect their rights in the event of bankruptcy. Acts of the International Labor Organization (hereinafter - MOP) play a primary role here. For example, its Wage Protection Convention No. 95 has been ratified by 96 countries. In accordance with this Convention, safeguards must be developed to ensure full payment of due wages and to protect workers against unfair reductions in their remuneration (for example, in the event of excessive deductions or attachment orders or as a result of company bankruptcy). Article 11 of the Convention indicates that in the event of bankruptcy of the enterprise, the employees will have the position of privileged creditors with respect to the wages they should receive for services rendered in the period preceding the bankruptcy, which will be determined by national legislation [1]. That is, employees have priority over other creditors. And this is manifested (at the highest level) in a specific provision mechanism, when the demands of employees are the first in line during the satisfaction of the company's financial problems [2]. In fact, today it is the status of a priority creditor that is the main form of protection for employees in the event of the company's insolvency.

The MOP Convention on Claims (Employer's Insolvency) No. 173 has been ratified by only 19 countries. Despite this, it significantly strengthens the system of privileges and improves international standards. For example, its Article 6 (Part II) outlines the minimum scope of workers' claims to which benefits apply. There are four groups of requirements: (1) requirements related to the established period (not less than three months before the onset of insolvency or termination of employment); (2) requirements for the payment of vacation pay in the event of work performed during the year of insolvency or termination and the preceding year; (3) applications for paid leave (for example, sick leave or maternity leave) related to a fixed period of at least three months; (4) severance pay. Article 7 of the Convention stating that the amount of payments should not be lower than the socially acceptable level is also important [3].

Another act of the MOP - Recommendation on the Protection of the Claims of Employees in the Event of Employer Insolvency No. 180 [4] specifies (Article 2 of Section II) that the employee's privilege must "protect" such claims as wages (at least 12 months), payments for paid holidays, payments in case of other types of paid absence from work, bonuses provided for by national law, compensatory payments, for example, in lieu of notice of dismissal, severance pay, compensation in connection with dismissal without good reason or in case of industrial injury or occupational disease.

As for regional European standards, they are represented by soft law norms. Thus, standards in the field of bankruptcy are represented in the updated Directive of the European Parliament and the Council of the EU 2019/1023 of June 20, 2019 on the system of preventive restructuring, on debt repayment and disqualification, as

well as on measures to improve the efficiency of restructuring, insolvency and debt repayment procedures and amending Directive 2017/1132 on restructuring and insolvency [5].

Directive 2019/1023 is of a general nature and applies to all matters related to the bankruptcy procedure. At the same time, the legal status of employees in this act is defined only within one article. Thus, Article 13 indicates the state's obligation to ensure the individual and collective rights of workers, with particular emphasis on: the right to collective bargaining and industrial action; the right to information and consultation in accordance with Directives 2002/14/EC and 2009/38/EC, in particular: informing employee representatives about the recent and likely development of the enterprise or institution and the economic situation, enabling them to convey to the debtor concerns about the state of the business and regarding the need to consider restructuring mechanisms; informing employee representatives of any preventive restructuring procedure that may affect employment, for example the ability of employees to receive wages and any future benefits, including occupational pensions; informing and advising employee representatives on restructuring plans prior to their submission for adoption; rights guaranteed by Directives 98/59/EC (on collective redundancies), 2001/23/EC (on the protection of the rights of employees in the event of the transfer of undertakings, undertakings or parts of undertakings or businesses) and 2008/94/EC (on the protection of employees in the event of insolvency their employer).

Such rather insignificant attention from the unified EU law to the legal status of employees can be explained by the fact that each state uses its own approaches and legal regulation of bankruptcy proceedings, has different labor legislation, legal traditions, and therefore states combine priorities and advantages in different ways with wage or pension insurance schemes or guarantee funds that project occupational and severance payments. Given this, it is very difficult to develop and implement a universal international (or multinational) model that would be acceptable for a wide range of countries.

After all, it was precisely because of the peculiarities of the national legislation of the EU member states in Regulation 2015/848 that it was deemed "impractical" to present the bankruptcy procedure with a universal code of conduct throughout the European Union. Therefore, only the legislation of the member state in which bankruptcy proceedings are conducted can determine the procedure for terminating employment contracts, protecting employees, claims for preferential rights, the status of such preferential rights, etc. [6].

As for Ukrainian legislation in the researched area, it is represented by a new comprehensive act. In 2019, the Code of Ukraine on Bankruptcy Procedures (hereinafter - KUzPB) [7] was adopted, which established the conditions and procedure for restoring the solvency of a debtor - a legal entity or declaring it bankrupt in order to satisfy the demands of creditors, as well as restoring the solvency of an individual. The dismissal procedure is also regulated by labor legislation.

So, we can make the first intermediate conclusion regarding our national law - it is about complex industry legal regulation of the researched issue. Let's distinguish two groups of norms.

The first includes the provisions highlighted in the bankruptcy legislation, which determine the specifics of the exemption. Thus, Article 66 of the KUzPB states that the dismissal of the debtor's employees can be carried out after the opening of bankruptcy proceedings and the appointment of a property administrator by the commercial court in accordance with the requirements of labor legislation.

Article 61 of the KUzPB stipulates that from the day the debtor is declared bankrupt and the liquidation procedure is opened, the liquidator notifies the bankrupt's employees of the dismissal and carries it out in accordance with the labor legislation of Ukraine. The payment of severance pay to the dismissed employees of the bankrupt is carried out by the liquidator, first of all, at the expense of funds received from the sale of the bankrupt's property or a loan obtained for this purpose.

We also positively evaluate the legal policy of the national lawmaker regarding the priority of meeting the demands of creditors (Article 64 of the KUzPB), according to which they include requirements for the payment of salary arrears to employees and dismissed bankrupt employees. However, this regulation has fully implemented the international and European standards cited above and, in addition to ordinary wages, the primary compensation is subject to monetary compensation for all unused days of annual leave and additional leave for employees who have children, other funds belonging to employees in connection with paid absence from work, as well as severance pay for employees in connection with the termination of employment relations, and insurance contributions for mandatory state pension insurance and other social insurance accrued on these amounts.

However, the norms regarding priority are not typical for all states. For example, according to Article 78 of the Law of Tajikistan "About Insolvency (Bankruptcy)", the payment of severance pay and wages to persons who work under an employment contract, in particular under a contract, as well as the payment of remuneration under author's contracts are carried out in the second place [8].

In general, bankruptcy legislation contains certain institutional guarantees for the protection of workers' rights. As an example, the functioning of the representative of the debtor's employees is a person who represents the interests of the debtor's employees during bankruptcy proceedings (has the right to an advisory vote), authorized to do so by a general meeting attended by at least two-thirds of the debtor's employees, or by the relevant decision of the primary trade union organization of the debtor (and if there are several primary organizations – by their joint decision).

It is worth noting that the powers of the representative of the debtor's employees concern only the sphere of protection of employees, that is, those persons who are in actual labor relations. In essence, the representative is called upon to find a consensus between the worker and the workers in order to avoid, if possible, an excessive number of dismissals of workers. This institutional guarantee does not apply to already dismissed workers, since they are not members of the labor team. In this case, the person protects his legal interests personally - he submits a corresponding application to the commercial court, which considers the bankruptcy case.

As the second group of norms, we will single out the provisions of the labor legislation. First of all, we note that the dismissal of employees is carried out on the basis of paragraph 1 of the first part of Article 40 of the Labor Code of Ukraine (hereinafter - the Labor Code) [9]. According to this clause, an employment contract concluded for an indefinite period, as well as a fixed-term employment contract before the expiration of its term of validity, may be terminated by the owner or a body authorized by him in the event of changes in the organization of production and work, including liquidation, reorganization, bankruptcy or repurposing of the enterprise , institutions, organizations, reducing the number or staff of employees. The specified norm actually expands the interpretation of Article 61 of the KUzPB, it provides for the possibility of dismissing employees even before declaring a business entity bankrupt. It is about the fact that the employer for the purpose of reorganization can use the dismissal of employees (to restore solvency) as a deterrent to a possible hypothetical bankruptcy. That is, the owner can fire employees even before the initiation of bankruptcy proceedings, citing "changes in the organization of production and labor" aimed at restoring the employer's solvency, as well as a related reduction in the number or staff of employees.

Article 49 of the Labor Code establishes a two-month notice period for dismissal, and there is no exception for employees in bankruptcy proceedings. If the layoff is large-scale, the employer must notify the employment service. When dismissing employees, the overriding right to keep a job is taken into account. At the same time, there are some categories of employees whose dismissal is possible only in case of complete liquidation of the enterprise, for example, pregnant women, single mothers, and also those employees who are on vacation or are temporarily unable to work. In case of termination of the employment contract on the basis of Clause 1, Part One, Article 40 of the Labor Code, the employee is paid severance pay in the amount of at least the average monthly salary.

Conclusions.

The legal status of employees during the bankruptcy procedure is regulated at three levels: 1) at the international level (acts of the International Labor Organization - Convention on the Protection of Wages No. 95, Convention on Claims (Insolvency of the Employer) No. 173, Recommendation on the Protection of Claims of Employees in the Event of Insolvency of the Employer No. 180); 2) at the regional level, these are soft law norms and are focused on the general regulation of bankruptcy procedures (Directive of the European Parliament and Council of the EU 2019/1023, Directive 2017/1132 on restructuring and insolvency); 3) at the national level - such norms have a codified nature and are contained in bankruptcy legislation and labor regulations.

Dismissal of an employee during the bankruptcy procedure takes place as follows: from the day the debtor is declared bankrupt and the liquidation procedure is opened, the liquidator notifies the bankrupt's employees of the dismissal; the primary task is the payment of salary arrears to employees and dismissed employees of the bankrupt; an additional institution for guaranteeing the rights of employees - their representative - is functioning.

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