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DEPENDENT WORK AND OBSCURATION OF EMPLOYMENT

Summary. The definition of dependent work is one of the crucial theoretical issues of the Labour law, the solution of which is of fundamental importance for the application and implementation practice. The paper is focused on dependent work, obscuration of dependent work, using the work of trader instead of employment as a problem of application practice. The competition of contractual types of Labour law, Commercial law and Civil law is not only a specific of the legal practice of the Slovak Republic. It is a current issue not only in the Member States of the European Union, but also in other countries of the world. Inspections of compliance with labour legislation are fairly frequent and the labour inspectorate penalizes the participants after proving illegal work and illegal employment.

Key words: employment, dependent work, employee, employer, trader, illegal work and illegal employment.

Introduction. The work gives a person earnings, provides the possibility of realization, diversity of life, social contacts and is a part of his personal identity. The work as a human activity is directed to earnings that enables one to secure his living conditions (food, housing, clothing) to satisfy both mental and physical needs, not only for his own, but also for all members of his family.

A person, who decides to be gainfully employed, often thinks whether to work with an employer or to start own business. The article 35 of the Act № 460/1992 Coll. Constitutional Act, as amended, provides the right to freedom of choice of the profession and its preparation, as well as the right to carry on the business and the right to engage in other gainful activity.

Most citizens of the Slovak Republic realize their statutory right to work in the form of employment relationship – employment. The employment as one of the basic employment relationships regulated by the Act № 311/2001 Coll. Labour Code, as amended (further only “Labour Code”).

Dependent work. Since not every activity is a work in the sense of Labour law, the subject of employment relationships is in general the activity of a person who performs dependent work for another. The work which is the subject of the Labour law, must meet certain legal characteristics, it must have certain typical features. Employee’s work must be human, free, dependent, non-self-employed, performed for another, remunerated and tied exclusively to the employee. Dependency is an inherent part of the job performance for the employer.

The definition of dependent work is a fundamental concept of the Labour law, which is a part of the legal orders and legal culture in almost all EU Member States, and denotes the work performed in the employment relationships. The Slovak legislation did not define the dependent work for a long time. In the past, it was true that “the employer is obliged to provide the predominant object of activity in particular by employees in employment or in a similar employment relationship” (the already annulled provision of § 7 section 4 of the Labour Code). This section has caused problems in application

practice, especially in terms of determining the predominant subject matter of the employer’s activity. The performance of dependent work was provided in other than employment relationships, and there was the obscuration of employment relationships by various contractual types of Commercial law or Civil law, which led to a reduction in the labour and social protection of persons performing dependent work. This has had a negative economic impact also in relation to tax obligations, and entrepreneurs have been deprived of any obligations arising from employment relations and obligations to pay contributions. The employers justified the problem of legal coverage of dependent work by commercial-law, respectively civil-law contractual types, among other things, by the absence of a precise definition of dependent work.

The amendment to the Labour Code deleted the abovementioned provision and with effect from 1 September 2007 has exhaustively defined the concept of “dependent work” in accordance with the generally accepted definition of dependent work within the European and world Labour law as well as within the International Labour Organization. Over the last few years, the original ten defining features of dependent work have been reduced to five, while “the gradual reduction of the features of dependent work was aimed at eliminating distortion in the labour market” [10]. It turned out that the less signs of dependent work, the more difficult it is possibility of circumventing the law. Based on the positive definition of § 1 section 2 of the Labour Code dependent work is defined as a work that is “carried out in relation to the employer’s superiority and employee subordination, personally for the employer, according to the instructions of the employer, on his behalf, in the working time determined by the employer”. Regarding the performance of work, all the above must be fulfilled. If not only one feature is fulfilled, it is not a dependent work. “Correct identification of the concept of dependent work in the labour legislation of the state is to prevent employers’ efforts to reduce a number of employees performing dependent work and to establish business relations with them” [1].

Dependent work may be performed exclusively in employment, in a similar employment relationship (eg state employment) or, exceptionally, under the conditions laid down in the Labour Code also in another employment relationship (it is understood an agreement on work performed outside of employment). On the basis of the negative definition of dependent work, the dependent work can not be performed in a contractual civil-law relationship or in a contractual commercial relationship under special regulations.

The reason for defining the term “dependent work” in the Labour Code was to remove the obscuration of employment relations by commercial relations. Defining the term “dependent work” has moved the Labour Code forward and could help to increase employee protection. As Engels says, “until now no legal system has found a clear and precise criteria under which it would be possible to seamlessly find out when it comes to the performance of dependent work” [3].

Obscuration of dependent work and its consequences. In practice, there are cases where employees are forced to change their

employment status, despite the fact these individuals continue to perform the same work. Employers are forcing employees to terminate their employment on the condition that they can continue to work as a “self-employed person” – this is called “Schwartz system” (in the Czech Republic) or “a trader from compulsion”. “There are situations where a natural person is carrying out a dependent work (for example a bricklayer who carries out construction work on the instructions of another entity) has a formal status as a trader, but the work is assigned by another entity (employer) who determines where and when to work, what work he/she is supposed to do and provides remuneration for work performed” [2]. The status of this natural person is, however, contrary to § 2 of Act № 455/1991 Coll. to regulate trades, as amended (further only “Trade Act”). The trade is a continuous activity operated independently, on its own behalf, on its own responsibility, in order to obtain a profit and under the conditions established by the Trade Act. In use of the trader’s work by the employer, the natural person does not have the character of an employee nor a pure entrepreneur.

The basic distinctive feature of employment relations from business in trade is the personal subordination and economic dependence of the employee. Unlike the employee who is guided by the employer’s instructions when performing the work, the trader carries out the trade independently, and decides alone what he will do. The employee voluntarily submits to the superior (employer), i.e. the employment relationship compared to other contractual types is not based on the principle of equality of the parties. The essence is based on the fact that the employer has the ability to manage the performance of the employee’s work and, on the other hand, the employee is obliged to follow the instructions of the employer. These facts meet the definitive features of the term “dependent work”, which can be considered as a starting differentiating criterion [5].

Based on the above facts, we can conclude that work that is a business under the Trades Act, is not dependent and a natural person doing business based on trades is an entrepreneur and not an employee.

The essence of using the work of trader is the circumventing the law in order to eliminate the fundamental rights of employees in the case of an existing employment. Among the advantages of using the work of trader are in particular:

- no social protection – no “employee benefits” are provided to the trader, eg. work breaks, holiday, subsistence allowance, overtime pay, income compensation for work obstacles;
- financial and administrative savings – no need to pay advance tax, health and social insurance premiums;
- no employment protection (eg, the protection period for dismissal, ...);
- no liability for accidents at work or occupational diseases;
- freedom of termination of contract, no severance allowance and discharge benefit;
- the reward of a trader is dependent on the result and the maturity of the invoices can be agreed;
- the liability of the trader is not limited, a trader corresponds to all of his possessions.

Securing work with commercial-law and civil-law relationships also brings disadvantages for the employer. The total costs of the trader’s work may be higher than of the employee’s. If a natural person performs a work that meets the characters of dependent work, in the case of an inspection by the Labour Inspectorate, there is a risk of reclassifying the services of the trader to the dependent work. According to Act № 82/2005 Coll. on illegal work and illegal em-

ployment, as amended, illegal work and illegal employment at the same time is considered to be a dependent work carried out by a natural person for a legal person or a natural person who is an entrepreneur and that natural person does not have a employment relationship or state employment with the entrepreneur. The consequences of the prequalification of the trader’s work on the dependent activity are the payment of the premium, the fine for non-payment of the advance payments, the fine from the Labour Inspectorate. In the case of illegal work and illegal employment, the employer is penalized for violating labour law rules imposing a fine up to 200 000 euros. There is also a threat to the employee, namely the imposition of a fine up to 331 euros.

Although many employers prefer the establishment of a commercial-law or civil-law relationship, newer labour law research increasingly confirms the benefits of entering into an employment relationship with the employee also for the employer. The possibility of intensive work disposition every hour of the working day is interesting for employers also for economic reasons. It is also cheaper for the employer to secure a permanent disposition with the employee by negotiating a stable, hierarchical contractual relationship compared with looking for a contractor for each required performance separately. In terms of control, it is easier to control employees in the performance of dependent work compared to the control of those who work in a commercial-law or civil-law relationship with the employer. Also the practice shows that the stable relationship between the performance of dependent work in the legal form of employment also positively affects the employee in increasing labour productivity [1].

While the practice shows that the work of traders continues to be used instead of employment, Olšovská said that the best definition of dependent work alone will not help unless more emphasis is placed on inspection [4]. The Report on searches and suppression of illegal work and illegal employment states that the number of work inspections carried out in 2016 to monitor compliance with the prohibition of illegal employment has risen again in comparison with the previous three calendar years. In 2016 the labour inspectors identified and demonstrated the illegal employment of 2 756 individuals, of whom 863 performed dependent work for the employer without a written closed employment relationship [6].

Conclusion. Despite the extended business in trade and the obscuration of employment relations by commercial and civil relations, most citizens of the Slovak Republic realize their legal right to work in the form of employment. The job is security, the employee is protected, he has the certainty of permanent income.

The number of working people has increased in recent years. Available data from the Statistical Office of the Slovak Republic, based on the Labour Force Survey (LFS), show that employment is rising. In 2013, there were more than 2 329 000 workers in the Slovak Republic. Year on year for the period 2014/2015 the number of working people increased from 2 363 000 to 2 424 000 persons, which is 61 000 more. A further increase was also recorded in 2016, when data show 2 494 100 workers, it means 70 000 more [8].

Practice has shown that despite the definition of “dependent work” the amendment to the Labour Code has not removed the negative state and there are still uncertainties with the application of this term. The consequence is the continued obscuration of employment relationships by other forms. [9] In my opinion, this issue should be re-evaluated in the legislative process. However, labour inspectorates need to be more vigilant and have to monitor employers’ compliance with these provisions more intensively.

Despite the advantages that brings for the employer the work in non-employment relationships, increasingly is confirmed the advantage of the employment also for the employer.

Finally, it should be emphasized, that the choice of the right contractual form depends exclusively on the content of the work performed. Whether or not it is a dependent work does not determine the name of the contract on the basis of which the work is carried out, but it is the content of the contract determining the conditions of work [7]. There is a rule that if the work has features of dependent work, the employment relationship must be concluded for the performance of such work. If the work does not have such features, the employer use the relevant contractual type of the Commercial Code or the Civil Code [11]. The performance of trader's activities, respectively activities of other entrepreneurs, will be possible only on the assumption that it is a work that shows the legal characteristics of the business. Thus, if the work has characteristics of activity under special regulations (Civil law, Commercial law), it is not a dependent work.

References:

- Barancová H. Pojem závislá práca (Kritická analýza). In Pracovnoprávne elementy výkonu (závislej) práce. Kritika a deformácia práva. Košice 2015. S. 5–17 [Electronic resource]. – Mode of access : <https://unibook.upjs.sk/img/cms/2015/pravf/zulova-pracovno-pravne-elementy-vykonu-prace.pdf>
- Barancová H. Aké problémy môžu vzniknúť v praxi / H. Barancová, A. Olšovská [Electronic resource]. – Mode of access : <http://dennik.hnonline.sk/servisne-prilohy/224075-ake-problemy-mozu-vzniknut-v-praxi/>.
- Engels Ch. Subordinate Employees or Self-Employed Workers? Comparative Labour Law and Industrial Relations in Industrialized Market Economies. Netherlands: Kluwer Law International, 2014. – P. 361–384.
- (Ne)kultúra sveta práce. [Electronic resource]. – Mode of access : <https://euractiv.sk/clanky/socialna-politika/nekultura-sveta-prace-020269/>.
- Frťalová A. Závislá práca po novele Zákonníka práce / A. Frťalová. – 2013 [Electronic resource]. – Mode of access : <http://www.epi.sk/odborny-clanok/Zavisla-praca-po-novele-Zakonnika-prace.aspx>.
- Národný inšpektorát práce. Informatívna správa o vyhľadávani a potierani nelegálnej práce a nelegálneho zamestnávania za rok 2016 [Electronic resource]. – Mode of access : http://www.nip.sk/?id_af=126&ins=nip.
- Skičková M. Najčastejšie priestupky zamestnávateľov / M. Skičková [Electronic resource]. – Mode of access : www.ip.gov.sk/?id_fa=611&ins=nip.
- Štatistický úrad sr. Zamestnanosť podľa výberového zisťovania pracovných síl [Electronic resource]. – Mode of access : <http://datacube.statistics.sk/TM1WebSK/TM1WebLogin.aspx>.
- Treľová S. Konkurencia zmluvných typov pracovného práva, obchodného práva a občianskeho práva / S. Treľová // Die Stellung des Arbeitsrechts im Rechtssystem der Slowakischen Republik : Sammelband wissenschaftlicher Beiträge. – Wien : Paul Gerin, 2012. – S. 61–66.
- Žulová J. Oslabovanie znakov závislej práce vo vybraných pracovných vzťahoch. In Pracovnoprávne elementy výkonu (závislej) práce. Kritika a deformácia práva / J. Žulová. – Košice, 2015. – S. 5–17 [Electronic resource]. – Mode of access : <https://unibook.upjs.sk/img/cms/2015/pravf/zulova-pracovno-pravne-elementy-vykonu-prace.pdf>.
- Act № 40/1964 Coll. Civil Code, as amended.
- Act № 455/1991 Coll. to regulate trades, as amended.
- Act № 460/1992 Coll. Constitutional Act, as amended.
- Act № 311/2001 Coll. Labour Code, as amended.
- Act № 82/2005 Coll. on illegal work and illegal employment, as amended.

Трельова С. Залежна робота та приховування зайнятості

Анотація. Визначення залежної роботи є одним із найбільш важливих теоретичних питань трудового права, вирішення якого має принципове значення для практики застосування. У статті увага зосереджена на залежній роботі, приховуванні праці, використанні праці трейдера замість працевлаштування в якості проблеми практики застосування. Конкуренція договірних видів трудового, комерційного та цивільного права є особливістю не тільки правової практики Словачької республіки. Це є сучасною проблемою не лише в країнах – членах Європейського союзу, але й в інших країнах світу. Перевірки дотримання трудового законодавства проводяться досить часто, а інспекція з охорони праці накладає штрафи на учасників після виявлення нелегальної роботи та нелегального працевлаштування.

Ключові слова: зайнятість, залежна робота, робітник, роботодавець, торговець, нелегальна робота та нелегальне працевлаштування.

Трельова С. Зависимая работа и сокрытие занятости

Аннотация. Определение зависимой работы является одним из самых важных теоретических вопросов трудового права, решение которого имеет принципиальное значение для практики применения. В статье внимание сосредоточено на зависимой работе, сокрытии зависимой работы, использовании работы торговца вместо трудоустройства в качестве проблемы практики применения. Конкуренция договорных видов трудового, коммерческого и гражданского права является особенностью не только правовой практики Словацкой республики. Это современная проблема не только стран – членов Европейского союза, но также и других стран мира. Проверки соблюдения трудового законодательства являются достаточно частым явлением, а инспекция по охране труда накладывает штрафы на участников после выявления нелегальной работы и нелегального трудоустройства.

Ключевые слова: занятость, зависимая работа, рабочий, работодатель, торговец, нелегальная работа и нелегальное трудоустройство.