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FORMS OF REALIZATION OF THE RIGHT TO REST: UKRAINIAN REALITIES AND FOREIGN EXPERIENCE

The article is devoted to the study of forms of realization of the right to rest in Ukraine and foreign countries. The opinions of modern scientists on the concept of realization of rights are considered. The necessity of using the terminology "form of the realization of the right to rest" instead of "types of a rest time" is substantiated. Forms of realization of legal norms, depending on the nature of their dispositions are researched and such types as fulfilment, execution and application are distinguished.

The forms of realization of the right to rest according to Ukrainian legislation are defined. The various views of modern scholars on the list of forms of realization of workers' right to rest are analyzed and the necessity of declaring periods of daily rest of employees is demonstrated.

The general rules concerning rest and meal breaks according to the Labour Code of Ukraine are analyzed and the need of detailed regulation of the specific time and duration of the rest and meal break by the state are clarified. Attention is drawn to the setting minimal duration of such a break, as in United Kingdom and France. It is emphasized on the existence of physiological breaks in legislation of a foreign country, which are important for maintaining high efficiency and a good health level of employees. Legislation of the Republic of Poland and United Kingdom concerning holidays and weekly rest days are investigated.

The importance of defining the concept and duration of daily rest in the relevant section of the Labour Code of Ukraine, as proposed by the European Union legislation is shown. The scientific literature concerning establishment of a minimal duration of daily rest lasting twelve hours to ensure adequate rest for workers who work part-time or overtime is analyzed. The provisions of international regulations in this sphere are taken into account.

Key words: forms of realization of the right to rest, break for rest and meal, weekly rest days, daily rest, holidays and non-working days.

Рибак О. О. ФОРМИ РЕАЛІЗАЦІЇ ПРАВА НА ВІДПОЧИНОК: УКРАЇНСЬКІ РЕАЛІЇ ТА ЗАРУБІЖНИЙ ДОСВІД

У статті з'ясовано форми реалізації права на відпочинок відповідно до чинного законодавства України, а саме: перерва для відпочинку і харчування, вихідні дні, святкові і неробочі дні, щорічна відпустка (основна та додаткова). Розглянуто поняття «реалізація норм права» та на його основі обґрунтовано вживання правової категорії «форми реалізація норм права», зокрема права на відпочинок, замість «види часу відпочинку».

Серед форм реалізації права на відпочинок залежно від характеру їх диспозицій виділено такі види: дотримання, виконання та використання. Також у цьому аспекті розглянуто види, за допомогою яких реалізується конкретна правова норма, що стосується права на відпочинок.

Розглянуто перелік форм реалізації права на відпочинок у міжнародних нормативно-правових актах та проведено паралелі з вітчизняними нормами законодавства, зокрема щодо необхідності закріплення святкових та неробочих днів у національному законодавстві кожної держави.

Доведено існування такої форми реалізації права на відпочинок, як щоденний відпочинок працівників, та наголошено на необхідності закріплення її у законодавстві України. Наведено як зразок норми іноземного законодавства, що стосуються щоденного відпочинку працівників.

Досліджено тривалість та порядок надання перерв для відпочинку та харчування в Україні та іноземних країнах, а також розглянуто їх належність до робочого часу чи часу відпочинку працівників. Проаналізовано думку науковців щодо встановлення мінімальної тривалості перерви для відпочинку та харчування в Україні. Зазначено, що регламентація часу та тривалості надання перерви для відпочинку та харчування державою забезпечує рівність усіх працівників на реалізацію цього права.

Внесено пропозиції щодо удосконалення правового регулювання періодів щотижневого відпочинку працівників на основі аналізу міжнародних нормативно-правових актів у цій сфері.

Ключові слова: форми реалізації права на відпочинок, перерви для відпочинку та харчування, вихідні дні, щоденний відпочинок, святкові і неробочі дні.

Introduction. Consolidation of the right to rest in normative legal acts is an initial stage on the way to its implementation. Legal norms do not cause legal consequences, but only fulfil its purpose when they are implemented by the relevant subjects of law. An important aspect in this process is to determine the form in which this right can be realized by employees.

Literature review. The problem of legal regulation of the realization of the right to rest is reflected in the works of domestic scientists: P. Pylypenko, V. Burak, O. Stasiv, K. Dmytriieva, H. Chanysheva. Despite the fact, that a lot of researches in this area have been conducted, there still is a need to study forms of realization of the right to rest in Ukrainian

legislation and to compare them with the experience of foreign countries in this sphere.

The Universal Declaration of Human Rights (hereinafter – the Declaration) established the basic forms and methods of realization of enshrined socio-economic human rights, including through national efforts and international cooperation in accordance with the structure and resources of each state. The Declaration emphasizes on the relationship between civil, political, social, economic and cultural rights, as well as the need to establish a social and international order in which they can be fully realized, and on the other hand recognizes the dependence of their implementation from the resources and economic capacity of each state [21].

Moreover, the Handbook for Parliamentarians No. 26, which was developed by the Inter-Parliamentary Union and the Office of the UN High Commissioner concerning Human Rights states that the health standard in poor countries may be lower than in rich countries without any violation of a State's obligations to fulfil the right to health. However, the total absence of positive measures to improve the public health system, retrogressive measures or the deliberate exclusion of certain groups (such as women and religious or ethnic minorities) from access to health services can, however, amount to a violation of the right to health [16].

Ukrainian legal science is quite ambiguous in understanding such a legal category as “implementation of the rule of law”. According to the research of P. Rabinovych, the implementation of legal norms is the implementation of their instructions in the practical actions (inaction) of the subjects [17]. Whereas, O. Skakun believes that the realization of legal norms is to implement the provisions of legal norms in the lawful behaviour of legal entities in their practical activities [18].

Thus, the necessary condition for realization of these norms is a certain form in which it can find the expression. With the aim to clarify these forms of the realization of the right to rest, there is a need to define the concept of the form of realization of the right. The problem is, that forms of realization of the right to rest are sometimes presented as types of leisure time in the scientific literature [13].

According to the definition of the Great Explanatory Dictionary of the Ukrainian language [12], “form” is an external manifestation of any phenomenon that is related to its essence and content. In our case, the expression of the right to rest is obviously a way to implement it into life. It should be noted that while realization the right to work, they use precisely such terminology and it is already quite stable and used. Since the Constitution of Ukraine makes the right to rest dependent on the right to work, it is necessary to examine the forms of realization of the right to work. In particular, N. Mokryts-

ka considers the legal form of realization of the right to work in two aspects: social and legal phenomenon. As a social phenomenon, the form of realization of the right to work is any ways of carrying out labour activity, which may not always be an expression of the legal form of realization of the right to free choice of employment. She believes that the use of abilities to work can be due to the natural desire to work, to meet its own and (or) social needs, but the person does not intend to ensure its own existence, as a result. Since the right to work is a natural and inalienable right, a person can use it independently. In this case, the boundary between the social and legal aspects is receiving profit for their work [15]. As for the right to rest, it can be considered only in the legal plane, as the right of “everyone who works”, so outside the legal relations it practically does not exist. And obviously such right should be combined with the corresponding payment, which is proportional to the income from work.

It should be noted that among the forms of realization of legal norms, depending on the nature of their dispositions, scientists distinguish the following types: fulfilment, execution and application.

To begin with, the fulfilment is associated with the implementation of prohibitive legal norms, which consists of the passive behaviour of subjects, committed regardless of their own desire. Whereas, the execution concerns the implementation of binding rules, which provides active behaviour of subjects and is carried out by them regardless of their own desire. Finally, the application is to implement the empowering legal norms, through the active behaviour of the subjects, carried out at their own request (for example, the implementation of legislation on leave) [17].

What about the right to rest, most of the norms in this area are implemented through such forms as execution and application. For example, a person can both use the right to leave or to waive this right, as while implementing a legal norm in the form of application, the employee is given an opportunity to decide for themselves whether to use the right or not. So, it does not matter whether an employee works during rest and meal break, or uses it for their personal needs, this time is not paid in any case, as Article 66 of the Labour Code of Ukraine “Rest and meal break” is implemented in form of execution.

Finally, if we turn to the Labour Code of Ukraine, in the view of Chapter V of this legislative act, we can distinguish the following forms of realization of the right to rest: break for rest and meal, weekly rest days, holidays and non-working days, annual leave (basic and additional).

It is necessary to mention that this list doesn't contain all forms of realization of the right to rest. Scientists emphasize on the existence of such form as daily rest of employees [19]. Although the exist-

ence of daily rest is not reflected in the Labour Code of Ukraine, it is determined based on the length of the working day, so the entire period of time outside working hours during the day will be considered, as the time of daily rest. Also, daily rest includes breaks between shifts. In accordance with Art. 59 of the Labour Code of Ukraine, the daily rest for employees engaged in shifts shall be at least twice the duration of work in the previous shift, including lunch break time.

Among the countries of Western Europe, such list of forms of realization of the right to rest is quite common. For example, the Labour Code of the Republic of Poland [5] provides for the workers the following periods of rest: daily and weekly rest, breaks during the working day and annual leave for employees.

In support of the position concerning the need to establish periods of daily rest, Polish legislation has clearly defined the existence of uninterrupted rest in each 24-hour period. However, the Polish Code [5] does not contain a list of weekly rest days and holidays, even though they do exist, as Article 130 states that “each public holiday during the calculation period that falls on a day other than Sunday reduces the length of working time by 8 hours. If in accordance with the applicable schedule of working time public holiday falls on a day off resulting from a schedule of working time in an average five-day working week it does not decrease the scope of working time”.

In the Labour Code of the Republic of Lithuania [14], adopted on June 1, 2017, among the forms of realizing of the right to rest, there should be distinguished physiological breaks, which can be justified in the view of so-called theory of human motivation by psychologist Abraham Maslow [6]. In this concept, human needs are presented in the form of a pyramid, which is based on physiological needs (the lowest level needs), including the need for food, water, protection and rest. It is true, that such classification narrows the understanding of human physiological needs, because they also include physical activity of workers, in particular industrial gymnastics, which is important for maintaining high efficiency and a good health level of employees [11]. What about lithuanian legislators, they justify such a break by objective necessity.

In the United Kingdom forms of realization of workers' rights to rest are governed by the Working Time Regulations (1998), which defines periods of weekly rest, daily rest, breaks during the working day and annual leave [8]. As in the Republic of Poland, there are no weekly rest days and holidays, but in fact they exist and are regulated by Bank Holidays Act [3], which was adopted in 1871. This Act was proposed by Sir John Lubbock and remains in force today. This legal act defined the

days when all banks and state organizations did not work, calling them “bank holidays”, that made them public holidays.

It should be noted that one of the forms of realization the right to rest defined by the current Ukrainian legislation are meal and rest breaks. In particular, the Labor Code of Ukraine declares its lasting no more than two hours. This breaks shall be provided after 4 hours from the start of the work. Also, the break period is not included in the working hours. Employees use it at their own discretion and at this time they can leave the workplace. Thus, the Labour Code of Ukraine establishes only general rules concerning rest and meal breaks, as well as Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time [10]. This legal act recommends that European Union Member States shall take the measures necessary to ensure that, where the working day is longer than six hours, every worker is entitled to a rest break, the details of which, including duration and the terms on which it is granted, shall be laid down in collective agreements or agreements between the two sides of industry or, failing that, by national legislation.

Interestingly, that in Argentina breaks for rest and meal are included in working hours and are paid [1]. In some other countries, workday breaks can also be partially included as working time. For example, in Iceland coffee breaks are considered a part of working hours, while meal breaks are excluded from working hours, unless the employee is working overtime or during the weekend [2].

In Norway, rest breaks must be considered as working time, if workers cannot leave the workplace during breaks or no satisfactory break room is provided [9]. Ukraine also provides the possibility for employees to eat during working hours at works, where break cannot be established due to production conditions. The list of such works, the procedure and place of eating are established by the owner or his authorized body in coordination with the elected body of the primary Trade Union organization (Trade Union representative) of the enterprise, institution, organization. It should be noted, that since the employee cannot independently manage its time, namely to leave their workplace, such period really cannot be considered as a “rest time” of the employee, and remuneration of employees in this case is paid for an actual time worked according to schedule [19].

In the literature, the norm of the Labour Code of Ukraine, which sets the duration of the rest and meal break is criticized, because setting the maximum rate and not setting the minimum is hardly appropriate. For example, in the United Kingdom, as in France, there is a minimal break of 20 minutes and the employee has the right to be outside his workplace during this time (if he has one).

In New Zealand, the duration of the rest and meal break depends on the number of working hours. A 10 minute break is provided for each four hours of work and for workers' who work only from two to four hours. Additionally, those working over four hours during day have an unpaid 30 minute meal break [4].

It is worth noting, that such a detailed regulation of the time and duration of the rest and meal break by the state ensures the equality of all employees to exercise this right. Also, dividing the break into separate sections for rest and meal throughout the working day leads to a better recovery of the workforce.

One more form of realization of the right to rest is the period of daily rest of employees. Such rest is an interval between two shifts, made up of a period of continuous non-working hours within a 24-hour period. According to the legislation of the European Union, the standard duration of daily rest is usually 10–12 consecutive hours. In particular, Directive 2003/88/EC on certain aspects of the organization of working time required Member States to ensure that every worker is entitled to a minimum daily rest period of 11 consecutive hours per 24-hour period.

The Labour Code of Ukraine established the duration of the break in work between shifts, which must be at least twice the duration of work in the previous shift (including lunch break). Such legal regulation of daily rest does not seem to meet modern international requirements for labour legislation and violates the complexity of the rules relating to the rest time of employees. That's why, it would be appropriate to define the concept of daily rest and its duration in the relevant section of the Labour Code of Ukraine, as proposed by the Directive 2003/88/EC on certain aspects of the organization of working time (11 consecutive hours per 24-hour period).

However, scientists propose to establish a minimal duration of daily rest lasting twelve hours to ensure adequate rest for workers who work part-time or overtime. As a person needs at least eight hours of healthy sleep to recover, time to get home from work and time to eat, then we will get twelve hours [20].

The International Labour Organization (ILO) promotes the establishment of an international standard in a maximum of 8 daily working hours [4]. In addition, the Committee of Experts notes that overtime must be limited reasonably "in order to provide protection against undue fatigue and to ensure reasonable leisure and opportunities for recreation and social life [7].

The need to establish an appropriate form of realization of right to rest is connected with the need of daily rest of all employees, regardless of whether they work in the morning, evening, day or night. The ILO Utilisation of Spare Time Recommendation, 1924 (R21) provides that daily rest must be sufficiently long including time for both sleep and spare time, which shall be spent freely according to the workers' individual interests.

Another form of realization of the right to rest is the periods of weekly rest of employees. Although the periods of such "weekly rest" are not specified in the legislation, their minimal duration is set – 42 hours.

Directive 2003/88/EC concerning certain aspects of the organisation of working time of 4 November 2003 [10] provides that Member States shall take the measures necessary to ensure that, per each seven-day period, every worker is entitled to a minimal uninterrupted rest period of 24 hours plus the 11 hours' daily rest. If objective, technical or work organisation conditions so justify, a minimum rest period of 24 hours may be applied. The ILO does not set the duration of weekly rest, which is common to all sectors of the economy, but determines it separately for industry, trade and government agencies. The ILO Weekly Rest Convention of 1921 (No. 14) provides for a 24 consecutive hour weekly rest period. One day weekly rest is the minimal standard in the EU and in national legislation in many countries. In practice, weekly rest days can be provided on consecutive days depending on the legislation or agreement, but workers should get at least one full day or 24-hour period per week. Weekly rest can be guaranteed with specific starting and ending times. Also, in most national legislation the weekly rest period is organized according to the local customs, meaning the rest day is either on Friday, Saturday, or Sunday (or a combination of consecutive days if the worker gets more than 1 rest day).

To sum up, defining forms of realization of the right to rest is an important step on the way of its implementation. For this reason, it is necessary to analyze international legal acts and to consider the opinion of scientists in this sphere. The current system of forms of realization of the time to rest in Ukraine needs to be improved by inclusion to the Labour Code of Ukraine provisions concerning daily rest and its duration, as in legislation of the European Union. Also, the minimal duration of rest and meal break has to be clearly defined in Ukrainian legislation.

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