UDC 349.2
DOI https://doi.org/10.32849/2663-5313/2022.11.01

Oleksandr Husarov,
PhD in Law, Head of Pechenizka ATC, Postdoctoral Student, Kharkiv National University of Internal Affairs, 27, Lev Landau avenue, Kharkiv, Ukraine, postal code 61080, oleksandrhusarov@ukr.net
ORCID: *orcid.org/0000-0001-7493-1789*

Husarov, Oleksandr (2022). Principles of regulating atypical forms of hired workers' employment. *Entrepreneurship, Economy and Law*, 11, 5–10, doi: https://doi.org/10.32849/2663-5313/2022.11.01

PRINCIPLES OF REGULATING ATYPICAL FORMS OF HIRED WORKERS' EMPLOYMENT

Abstract. Purpose. The purpose of the article is to establish the scope and essence of the principles of regulating atypical forms of hired workers' employment. ***Results.*** The article, relying on the analysis of scientific views of scholars and provisions of legislation in force, classifies the principles of regulating atypical forms of hired workers' employment, which are proposed to group into: general, intersectoral and special. The author proves that an important area of activities of the national legislator is to amend and supplement the legislation in force with a view to defining the scope and content of the principles of regulating atypical forms of hired workers' employment. It is determined that general legal principles are the principles which are inherent in regulating of social relations in all sectors of public life, and the sector of social relations under study is no exception. While general legal principles define only general aspects of the relevant regulatory mechanism, its content is more fully and qualitatively disclosed in sectoral and special principles. Unity and differentiation are considered in the labour law study in their interconnection and interaction, without opposition. Labour law in the aggregate of legal provisions that comprise it develops not towards unity, but towards the elimination of unjustified differences caused unreasonably; from general to special, from common principles to their specification for certain categories of employees and certain types of work (for example, for water transport workers). As for differentiation, it is carried out through the specification of general provisions of law, the establishment of additional benefits and privileges for employees compared to the legislation in force that does not contradict the idea of social equality, since the established differences in the content and scope of rights and duties of employees and employers are not aimed at creating privileges for the respective social groups, but at achieving compliance of labour law with the specifics of labour relations. ***Conclusions.*** It is concluded that today the principles of regulating atypical forms of hired workers' employment are not legally defined, which significantly complicates scientific research in this area, as well as law enforcement activities. That is why we are convinced that an important area of activities of the national legislator is to amend and supplement the legislation in force in order to determine the scope and content of the principles of regulating atypical forms of hired workers' employment.

Key words: principles, regulatory mechanism, atypical forms of employment, general legal principles, sectoral principles, special principles.

1. Introduction

The regulatory mechanism for atypical forms of employment should be based on the starting points, the initial ideas, which are commonly called principles. The latter are not just an ideological basis for regulating the relevant social relations but determine the directions of their development. Therefore, the principles of regulating atypical forms of hired workers' employment are the starting points, the initial ideas underlying the regulatory mechanism for labour activity of the actors of labour law under study. The principles define the key areas and prospects for the development of labour relations with employees who work remotely, from home or on a flexible schedule.

Some problematic issues related to the legal regulatory mechanism for atypical forms of hired workers' employment were considered in the scientific works by: D.O. Balobanova, O.P. Vikhrov, I.O. Vikhrova, T.P. Holopych, A.Yu. Dietochka, S.V. Kivalov, A.V. Kravchuk, P.H. Pererva, O.V. Priieshkina, and many others. However, despite numerous scientific achievements, the issue of the principles of regulating atypical forms of hired workers' employment is still poorly developed in the scientific literature.

Consequently, the purpose of the article is to establish the scope and essence of the principles of regulating atypical forms of hired workers' employment.

2. Content of legal principles

First, it should be noted that these principles are diverse in nature and content, and therefore, it is most appropriate to group them into: 1) general legal principles, which are characteristic of all branches of law, regardless of the sector of public life in question. These principles are: the rule of law; legality; ensuring human and civil rights and freedoms; justice; humanism; efficiency and effectiveness; and scientificity; 2) sectoral principles, i.e., those that underlie the labour regulatory mechanism for all categories of employees, without exception: the principle of unity and differentiation; equality of subjects of labour relations; certainty of labour function; contractual nature of labour; legal (including disciplinary and material) liability; 3) special principles, i.e., foundations specific to the legal regulatory mechanism for atypical forms of hired workers' employment: the principle of limitation in determining the categories of employees who may work remotely, from home or on flexible working hours; the principle of personal responsibility of the employee; the principle of free choice of work and rest time; the principle of flexibility; the principle of expediency of using an atypical form of employment; the principle of stability of labour relations.

With regards to the general legal principles, it should be marked that they are also inherent in the principles of regulating atypical forms with the use of borrowed labour. In this context, primarily, we will focus on the principles of the rule of law and legality. The rule of law serves as a legal foundation both in the field of implementation of the law enforcement function of the state by law enforcement bodies and for the entire legal system of Ukraine in general and means that: 1) It is not the state that creates law, but vice versa, law is the basis of organisation and life of the state represented by its public authorities, officials and, in particular, law enforcement bodies; 2) The right to limit state power, because in a legal state, power has certain limits that it cannot ignore; 3) The right is formed by civil society institutions in the course of its daily functioning, and the state only officially recognises, formalises and gives the right binding force, systemises and protects it; 4) The right and law are distinguished, while the rule of law is established in accordance with the law; 5) Law and the state are considered self-sufficient and relatively independent social phenomena with their own history, patterns of existence and functioning; etc. (Avakian, 2015, pp. 128-129).

Next, with regards to the principle of legality, it is worth noting that, in general, it is a complex political and legal phenomenon that reflects the legal nature of the organisation of socio-political life, the organic relationship between law and power, law and the state. In a broad socio-political sense, legality is a regime of socio-political life (Vikhrov, Vikhrova, 2015). According to O.P. Vikhrov and I.O. Vikhrova, the content of legality is: 1) inseparability from mandatory law; 2) a method of state governance of society – by adopting regulations and ensuring their implementation; 3) the principle of state activities. Therefore, legality is a regime (state) of compliance of social relations with laws and bylaws of the state, which is formed as a result of their strict implementation by all actors of law (Vikhrov, Vikhrova, 2015).

Therefore, the rule of law and legality are two key principles underlying the regulatory mechanism for any social relations. They imply not only the need to comply with the provisions of the legislation in force in the course of carrying out relevant activities, but also other social regulators, such as moral and ethical provisions, legal customs, etc. The importance of the principles of the rule of law and legality is also due to the fact that these principles underlie the formation of all other, both sectoral and special principles of regulating atypical forms of hired workers' employment.

Further, among the general legal principles of regulating atypical forms of hired workers' employment, the principle of priority of ensuring human and civil rights and freedoms should be mentioned. Ensuring human rights and freedoms is the facilitation of an enabling environment for the exercise of human rights and freedoms, which has the following three teleological dominants (purposeful directions) of state activities: 1) to promote the realisation of human rights and freedoms (by positively influencing the formation of their general social guarantees); 2) to protect human rights and freedoms (by taking measures, including legal ones, to prevent offences); 3) to defend human rights and freedoms (in case of their violation by anyone) (Priieshkina, 2017). Thus, the principle of priority of human and civil rights and freedoms is one of the leading general principles of modern Ukrainian law, which is the primacy of man and of the citizen, the primacy of their rights, freedoms and legitimate interests in relation to the executive authorities of the state, the essence of which consists of three main goals: rights and freedoms of man and of the citizen are the highest values for society and are a priority over the interests of the state; the main duty of public authorities is to respect, affirm and ensure rights and freedoms of man and of the citizen; although the provisions of the Constitution and laws of the state are an important source of law, but the deter-

mining source of rights in society is natural human rights (Kravtsov, 2009, p. 141).

As for the principle of humanism, it is one of the most essential value characteristics of a civilised society that recognises the welfare of a person, his or her right to freedom, happiness, and the expression of his or her abilities as a criterion for the progressiveness of social institutions. The principles of humanism are inherent in all civilised legal systems. They also reveal one of the most important value characteristics of law. The law enshrines and actually guarantees the natural and inalienable rights and freedoms of every person: the right to life, health, personal freedom and security, the right to protection of one's honour and dignity, protection from any unauthorised interference in the sphere of personal life and other rights (Chebotarov, 2012, p. 206).

3. Principles of regulatory mechanism in labour law

The principles of efficiency and effectiveness of regulatory mechanism for atypical forms of hired workers' employment should be underlined. The authors of *The Modern Economic Dictionary* argue that "efficiency is the effectiveness of economic activity, economic programmes and measures, characterised by the ratio of the economic effect, the result to the spending of factors and resources that led to this result; achieving the greatest amount of production using a limited amount of resources or ensuring a given output at minimum costs" (Pererva, 2018). In turn, L.I. Fedulova argues that effectiveness is a measure of management accuracy, which is characterised by the achievement of the expected state of the management object, the management goal or the level of approach to it. It is associated with production, technological and management processes, specific problems and ways to solve them. The levels of the organisation's phase state vary. They can be characterised by both high and low coefficients. Depending on their size, different states of an organisation as a system can be formed in real practice, these are: stabilisation, dynamic equilibrium of system elements, loss of dynamic equilibrium of the organisation's components. This requires making different managerial decisions and criteria for their evaluation, which, in turn, determines the specifics of the performance system formation (Fedulova, 2004). The scientist notes that effectiveness, on the one hand, depends on the creation of conditions and labour results at a particular facility, and on the other hand, on the external environment and situations that determine market conditions, as well as on the amount of share capital and the amount of situational income from the goods sold (Dietochka, 2021).

Therefore, general legal principles are the principles which are inherent in regulating of social relations in all sectors of public life, and the sector of social relations under study is no exception. While general legal principles define only general aspects of the relevant regulatory mechanism, its content is more fully and qualitatively disclosed in sectoral and special principles. Primarily, the focus should be on the content of sectoral principles, which have been extensively studied in the scientific literature. In our opinion, the following principles should be highlighted:

1) the principle of unity and differentiation. Unity and differentiation are considered in the labour law study in their interconnection and interaction, without opposition. Labour law in the aggregate of legal provisions that comprise it develops not towards unity, but towards the elimination of unjustified differences caused unreasonably; from general to special, from common principles to their specification for certain categories of employees and certain types of work (for example, for water transport workers). As for differentiation, it is carried out through the specification of general provisions of law, the establishment of additional benefits and privileges for employees compared to the legislation in force that does not contradict the idea of social equality, since the established differences in the content and scope of rights and duties of employees and employers are not aimed at creating privileges for the respective social groups, but at achieving compliance of labour law with the specifics of labour relations. Differentiation of legal regulatory mechanism for labour and closely associated relations by categories of employees may be carried out by including special provisions for a certain category of employees in regulations on labour of general application, adopting regulations that apply to a certain group of employees, by excluding the possibility of applying certain general provisions to certain categories of employees (Orlova, 2020). Thus, the principle of unity and differentiation is aimed at ensuring a special approach to the regulatory mechanism for the work of employees who work remotely, from home or on a flexible schedule. However, through unity, equal guarantees are provided to protect the rights and freedoms of this category of employees on an equal basis with others;

2) the principle of equality of actors of labour relations. The content of this principle is derived from Article 2^1 of the Labour Code of Ukraine, which prohibits any discrimination in the field of labour, including violation of the principle of equal rights and opportunities, direct or indirect restriction of employees' rights based on race, skin colour, political, reli-

gious and other beliefs, gender, ethnic, social and foreign origin, age, health status, disability, gender identity, sexual orientation, suspected or actual HIV/AIDS, marital and property status, family responsibilities, place of residence, membership in a trade union or other public association, participation in a strike, applying or intending to apply to a court or other authorities for the protection of their rights or supporting other employees in the protection of their rights, reporting possible facts of corruption or corruption-related offences, other violations of the Law of Ukraine "On Prevention of Corruption", as well as assisting a person in making such a report, on the basis of language or other grounds not related to the nature of work or conditions of its performance (Code of Labour Laws of Ukraine, 1971);

3) the principle of certainty of the labour function, which is manifested in the establishment of the labour function in a contractual manner, and the specific form of application of the employee's labour is determined by the will, free will of the employee and the employer. A condition of the labour function to be performed by the employee is the basis of an employment contract. It cannot be considered concluded unless the parties agree on the employee's profession, speciality, qualifications or position. The Labour Code enshrines the principle of contractual nature of labour relations and certainty of the labour function performed by an employee. Employees exercise their right to work by entering into an employment contract with an enterprise, institution, organisation or individual. When concluding an employment contract, the work performed by an employee (labour function) is determined by an agreement between the parties to the employment contract (Article 21 of the Labour Code) (Hruzinova and Korotkii, 2003);

4) the principle of contractual nature of labour. The contractual nature of labour relations is determined by the obligation to conclude an employment contract between a potential employee and a potential employer, and then, regardless of the form of ownership, the obligation to conclude a collective agreement at all enterprises, institutions or organisations that use hired labour and have the rights of a legal entity (Holopych, 2019);

5) the principle of legal (including disciplinary and financial) liability. The essence of this principle is that a person should be held legally liable for committing offences, including disciplinary offences, regardless of whether he or she is employed remotely or directly at the enterprise.

And the last group of principles consists of special principles, the rules thereof are aimed directly at regulating the labour activities of employees of atypical forms of employment. Among such principles, we have identified the following:

– the principle of restriction in determining the categories of employees who can work remotely, from home or on flexible working hours. The essence of this principle is that not all categories of employees may be involved in atypical forms of employment, but only those who can perform their labour function;

– the principle of personal responsibility of the employee, which means that the employee is mainly responsible for facilitating favourable working conditions for himself/herself (in particular, when it comes to remote and home-based work);

– the principle of free choice of working and resting hours, i.e. the employee chooses his/her own working and resting hours, but the total working week should not be less than 40 hours;

– the principle of flexibility. This principle has a double meaning: first, its observance allows the employer to effectively use labour resources, for example, employed remotely or from home; second, the employee has the opportunity to balance his or her needs and at the same time properly perform his or her work duties;

– the principle of expediency of using an atypical form of employment. Expediency is always something optimal that meets certain specific conditions, circumstances, without which the rule will not achieve the purpose originally laid down in it. Its application should be based on expediency as one of the main requirements proposed directly to the regulatory document itself. Compliance with expediency means compliance with the general spirit, the idea of the law (Balobanova, 2007). Therefore, the principle of expediency in the context of the topic means to find a balance between the need to use atypical forms of employment and production efficiency;

– the principle of stability of labour relations, which means that atypical forms of employment are used primarily to ensure the stability of the labour collective.

4. Conclusions

Thus, to conclude the presented research, it should be noted that today the principles of regulating atypical forms of hired workers' employment are not legally defined, which significantly complicates scientific research in this area, as well as law enforcement activities. As a result, we are convinced that an important area of activities of the national legislator is to amend and supplement the legislation in force in order to determine the scope and content of the principles of regulating atypical forms of hired workers' employment.

References:

Avakian, T.A. (2015). Verkhovenstvo prava yak osnovopolozhnyi pryntsyp derzhavnoi polityky u sferi vnutrishnikh sprav [The rule of law as a fundamental principle of state policy in the field of internal affairs]. *Yurydychnyi chasopys Natsionalnoi akademii vnutrishnikh sprav - Legal Journal of the National Academy of Internal Affairs*derzhavy i prava [Theory of the state and law]. Chernihiv: Desna Polihraf (in Ukrainian).

Balobanova, D.O. (2007). Teoriia kryminalizatsii [The theory of criminalization]. *Candidate's thesis.* Odesa: Nats. un.-t "Odeska yurydychna akademiia" (in Ukrainian).

Chebotarov, S.S. (2012). Humanizm yak pryntsyp prava Ukrainy [Humanism as a principle of Ukrainian law]. *Aktualni problemy derzhavy i prava - Actual problems of the state and law,* 64, 205-210 (in Ukrainian).

Dietochka, A.Yu. (2021). Pryntsypy realizatsii pravookhoronnoi funktsii derzhavy: administratyvno-pravovyi aspekt [Principles of implementation of the law enforcement function of the state: administrative and legal aspect]. *Candidate's thesis.* Kharkiv (in Ukrainian).

Fedulova, L.I. (2004). Menedzhment orhanizatsii [Management of Organizations]. K.: Lybid (in Ukrainian).

Holopych, T.P. (2019). Sotsialno-pravovi zasady dohovirnykh vidnosyn u trudovomu pravi Ukrainy [Social and legal foundations of contractual relations in the labor law of Ukraine].*Candidate's thesis.* Kryvyi Rih: Donetskyi yurydychnyi instytut MVS Ukrainy (in Ukrainian).

Hruzinova, L.P., Korotkii, V.H. (2003). Trudove pravo Ukrainy [Labor law of Ukraine]. K.: MAUP (in Ukrainian).

Kodeks zakoniv pro pratsiu Ukrainy: vid 10.12.1971 № 322-VIII [Code of Labor Laws of Ukraine: dated 10.12.1971 No. 322-VIII]. (1971). *rada.gov.ua*. Retrieved from https://zakon.rada.gov.ua/laws/show/322-08/conv#Text (in Ukrainian).

Kravtsov, A. (2009). Pryntsyp priorytetu prav i svobod liudyny ta hromadianyna v suchasnomu administratyvnomu pravi Ukrainy: poniattia ta sutnist [The principle of priority of human and citizen rights and freedoms in modern administrative law of Ukraine: concept and essence]. *Problemy pravoznavstva ta pravookhoronnoi diialnosti - Problems of jurisprudence and law enforcement*, 2, 140-143 (in Ukrainian).

Orlova, N.H. (2020). Zahalni zasady yednosti i dyferentsiatsii pravovoho rehuliuvannia trudovykh vidnosyn pratsivnykiv vodnoho transportu [General principles of unity and differentiation of legal regulatory mechanism for labor relations of water transport workers]. *Naukovi zapysky - Scientific Notes*, 9, 58–63 (in Ukrainian).

Pererva, P.H. (2018) Efektyvnist yak ekonomichna katehoriia [Efficiency as an economic category]. *Visnyk Natsionalnoho tekhnichnoho universytetu "Kharkivskyi politekhnichnyi instytut" - Bulletin of the National Technical University "Kharkiv Polytechnic Institute",* 15 (1291), 137-143 (in Ukrainian).

Priieshkina, O.V. (2017). Zabezpechennia prav liudyny v Ukraini: stan ta perspektyvy [Ensuring human rights in Ukraine: state and prospects]. *Naukovi zapysky NaUKMA - Scientific notes of NaUKMA,* 200, 109-114 (in Ukrainian).

Олександр Гусаров,
кандидат юридичних наук, голова Печенізької ОТГ, докторант, Харківський національний університет внутрішніх справ, проспект Льва Ландау, 27, Харків, Україна, індекс 61000, oleksandrhusarov@ukr.net
ORCID: *orcid.org/0000-0001-7493-1789*

ПРИНЦИПИ ПРАВОВОГО РЕГУЛЮВАННЯ НЕТИПОВИХ ФОРМ ЗАЙНЯТОСТІ НАЙМАНИХ ПРАЦІВНИКІВ

Анотація. ***Мета.*** Мета статті – встановити коло та сутність принципів правового регулювання нетипових форм зайнятості найманих працівників. ***Результати.*** У статті, спираючись на аналіз наукових поглядів учених та норм чинного законодавства, здійснено класифікацію принципів правового регулювання нетипових форм зайнятості найманих працівників, які запропоновано поділити на три великі групи: загальноправові, міжгалузеві та спеціальні. Доведено, що важливим напрямом діяльності вітчизняного законодавця є внесення змін та доповнень до чинного законодавства з метою визначення кола та змісту принципів правового регулювання нетипових форм зайнятості найманих працівників. Визначено, що загальноправові принципи – це принципи, які є властивими для регулювання суспільних відносин у всіх галузях суспільного життя, не винятком є і досліджувана сфера суспільних відносин. Разом із тим якщо загальноправові принципи визначають лише загальні аспекти відповідного регулювання, то більш повно та якісно його зміст розкривається у принципах галузевих та спеціальних. Єдність та диференціація розглядаються в науці трудового права в їх взаємозв'язку і взаємодії без протиставлення. Трудове право у сукупності правових норм, що його становлять, розвивається не шляхом до єдності, а у напрямі усунення невиправданих відмінностей, викликаних необґрунтованими причинами; від загального до особливого, від єдиних

принципів до їх конкретизації для окремих категорій працівників та окремих видів праці (наприклад, для працівників водного транспорту). Що ж стосується диференціації, то вона здійснюється через конкретизацію загальних норм права, встановлення додаткових переваг та пільг для працівників порівняно з чинним законодавством, що не суперечить ідеї соціальної рівності, оскільки встановлені відмінності у змісті та обсязі прав і обов'язків працівників і роботодавців спрямовані не на створення привілеїв відповідним соціальним групам, а досягнення відповідності норм трудового права особливостям трудових відносин. ***Висновки.*** Зроблено висновок, що на сьогодні принципи правового регулювання нетипових форм зайнятості найманих працівників є законодавчо не визначеними, що значно ускладнює здійснення наукових пошуків у зазначеному напрямі, а також правозастосовну діяльність. Саме тому ми переконані, що важливим напрямом діяльності вітчизняного законодавця є внесення змін та доповнень до чинного законодавства з метою визначення кола та змісту принципів правового регулювання нетипових форм зайнятості найманих працівників.

Ключові слова: принципи, правове регулювання, нетипові форми зайнятості, загальноправові принципи, галузеві принципи, спеціальні принципи.

The article was submitted 19.07.2022
The article was revised 09.08.2022
The article was accepted 30.08.2022