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TERMINATION OF LABOR CONTRACT BY MUTUAL AGREEMENT

TERMINACIÓN DEL CONTRATO DE TRABAJO

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Abstract. The article dwells upon issues arising as a result of dissolution of labor contract by agreement of the parties, due to lack of provisions of the definition of such agreement, its compulsory and supplementary conditions as well as the form of the agreement in the Labor Code of the Russian Federation. The authors analyse legal views of general jurisdiction courts and the Constitutional Court of the Russian Federation on the grounds for termination of labor contract, considers the scientists' positions on the same point set out in legal literature. On the basis of general legal concepts of agreement, provisions of the Labor Code of the Russian Federation of such agreement, general principles of labor law, procedure of entry into legal force of a labor contract, the said agreement is defined as a universal reason for termination of a labor contract, which is willful stipulated deed of the parties on a stated date reduced to writing. The article also settles down obligation of certain conditions of agreement for termination of labor contract, proposes specific variants of supplementary conditions of the agreement, indicates criteria, which any supplementary conditions of such agreement shall comply with.

Keywords. Agreement on termination of labor contract, its conditions and form, supplementary guarantees and compensations for dismissed employees.

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1. INTRODUCTION

As we know, one of the grounds for termination of labor contract is an agreement of the parties.

The norm dedicated to this foundation is contained in Art. 78 of the Labor Code of the Russian Federation, by virtue of which at any time the parties to labor contract may terminate it.

It should be noted the conciseness of the quoted norm, which clarifies only one fundamental circumstance - the labor contract for this basis can be terminated at any time.

Such a clarification, as well as the fact that the Labor Code of the Russian Federation does not specify the type of labor contract that can be terminated by agreement of the parties, allow us to conclude basis is universal and can be used by the parties to various types of labor contracts, regardless of the period it actions, subject composition or specifics of work.

In this case, of course, it should be borne in mind that the procedure for terminating labor contract may have particularities depending on the type of labor contract. So, according to Part 3, Art. 307 of the Labor Code of the Russian Federation, an employer who is a natural person, who is not an individual entrepreneur, should terminate this contract with the local self-government body in which the named contract was registered upon termination of the labor contract.

Earlier, as noted by scientists, this basis for dismissal, provided by the Labor Code of the Russian Federation, was used exclusively for the early termination of fixed-term labor contracts, which, according to the Labor Code, could not be terminated at the initiative of the employee without good reason. In other cases, when the parties were willing to terminate the labor contract by mutual agreement, the employee was offered to write a letter of resignation at his own request.

2. DISCUSSION

The considered basis for termination of labor contract is an agreement, that is, an agreed will of the employee and the employer should be achieved, aimed at terminating the labor contract and, accordingly, the individual labor legal relationship.

Voluntary consent of the parties in the Labor Code of the Russian Federation is not mentioned, there is no explanation about it in the decision of the Plenum of the Supreme Court of the Russian Federation dated March 17, 2004 No. 2 (as amended on September 28, 2010) “On the application by the courts of the Russian Federation of the Labor Code of the Russian Federation”.

At the same time, in relation to termination of labor contract initiated by an employee, the Plenum of the Supreme Court of the Russian Federation indicates the need for an employee’s voluntary will - in accordance with clause 22 of the said resolution, an employee’s cancellation of an labor contract is permissible in the event that his application for dismissal was voluntary.

Moreover, when considering a specific civil case for the recovery of monetary compensation due for dismissal, interest for delayed payment, non-pecuniary damage, the Judicial Collegium for Civil Cases of the Supreme Court of the Russian Federation referred to voluntariness in December 6, 2013 No. 5-KG13-125, as evidenced by the definition of an agreement on the termination of a labor contract as a voluntary and coordinated will of the employee and employer contained in this court decision.

A similar definition of an agreement on termination of an labor contract is also contained in the Definitions of the Constitutional Court of the Russian Federation dated October 13, 2009 No. 1091-OO, dated July 17, 2014 No. 1704-O, dated June 27, 2017 No. 1318-O.

Taking into account that in the Labor Code of the Russian Federation there is no norm obliging the parties to enter into such an agreement upon the occurrence of any circumstances or as a result of actions (inaction) of certain or uncertain individuals, it seems that in the case under review the parties' voluntary nature is indeed presumed.

The lack of voluntariness excludes the existence of the agreement, which is recognized as the basis for termination of the labor contract.

When challenging the termination of a labor contract on this basis, the lack of voluntary will of the party must be proved by the party that refers to it, which follows, firstly, from the presumption of voluntariness; secondly, from Part 1 of Art. 56 of the Civil Procedure Code of the Russian Federation, according to which each party must prove the circumstances to which it refers as based on its claims and objections, unless otherwise provided by federal law; thirdly, it is confirmed by the legal position of the Plenum of the Supreme Court of the Russian Federation, applied by analogy allowed by civil procedural law, that if the plaintiff claims that

the employer forced him to file a letter of resignation at his own will, this fact is proved by the employee (paragraph 22 above).

In addition to voluntariness, the actual aspect of the agreement is the existence of a concerted will of the parties. The will of each of the parties to the labor contract should be directed precisely to the termination of the labor contract.

Since when dismissing an employee, various issues are subject to resolution, the parties' agreed will on these issues and its reflection in the terms of the agreement in question are not excluded. These conditions include the conditions determining the realization of the right to leave, including the right to provide unused leave with subsequent dismissal (part 2 of article 127 of the Labor Code of the Russian Federation), payment of severance pay (part 4 of article 178 of the Labor code of the Russian Federation).

For example, the parties may stipulate in the agreement on termination of labor contract a condition on the payment of an increased amount of severance pay to an employee. At the same time, the parties should take into account that the legislator lists certain categories of workers in respect of which there are restrictions on the payment of these benefits (Article 349.3 of the Labor Code of the Russian Federation).

In addition, the payment of severance pay upon dismissal on this basis is made if the possibility of payment was provided for in the labor or collective agreement, that is, the agreement on the termination of the labor relationship can only duplicate the above-mentioned contracts, but not substitute them. Another would be contrary to the literal interpretation of Part 4 of Art. 178 of the Labor Code of the Russian Federation.

In view of the fact that acts of social partnership and labor contracts can not contain conditions restricting rights or reducing the level of workers' guarantees in comparison with the established labor legislation and other normative legal acts containing labor law norms (Part 2, Article 9 of the Labor Code of the Russian Federation), conditions agreements on the termination of the labor contract, providing for additional guarantees and compensation for the employee, based on an labor contract or collective agreement, are very likely and correspond to the basic principles Satisfactory legislation.

Absence in Art. 78 of the Labor Code of the Russian Federation, the list of mandatory conditions for an agreement on the termination of an labor contract raises the question of whether the condition on the date of termination of the labor contract applies to the mandatory conditions of the agreement on termination of the labor contract.

In accordance with Part 1 of Art. 61 of the Labor Code of the Russian Federation, the labor contract, as a general rule, comes into force from the date of its signing by the employee and the employer. Given this rule of law, it can be assumed that the labor contract, if there is no termination date in the agreement, must be terminated from the date of simultaneous signing by the parties of the labor contract of an agreement on the termination of the labor contract, and if the parties sign the agreement at the same time, this day is the day of signing the labor contract by that party, which is not the initiator of the agreement and the first person who signed the document, testifying to the achievement of the agreement by the parties.

At the same time, one of the parties may shy away from signing the agreement, transferring the date of signing for an indefinite time, which excludes the termination of the labor contract with the specific date known to both parties and sets the party signing the agreement into an unequal position with the party that evaded the commission of the said action. Such uncertainty also forces the signatory to clarify the validity of his or her status as a party to an labor contract.

In addition, Part 1 of Art. 61 of the Labor Code of the Russian Federation provides for exceptions to the general rule on the entry into force of the labor contract, namely, the entry into force of the labor contract is possible not on the date of its signing in cases provided for by the Labor Code of the Russian Federation, federal laws, other regulations of the Russian Federation or an labor contract or from the date of the actual admission of the employee to work.

3. THE RESEARCH FINDINGS

Consequently, if a contractual agreement has not been signed by the party, but the actual admission of the employee to work takes place, the labor contract is deemed to have entered into force, and therefore the avoidance of one of the parties from signing the labor contract in this situation of uncertainty of the legal status of the person as a party to the labor contract does not entail.

In view of the foregoing, the term for termination of the labor contract must be specified in the

designated agreement of the parties to the labor contract. The specification of the term of termination of labor contract is also insisted in legal literature.

Arguing about the will of the parties to the labor contract, it is difficult to ignore the question of the authority of the person to act on behalf of the employer, which is the organization.

According to Part 6 of Art. 20 of the Labor Code of the Russian Federation, the rights and obligations of the employer are exercised by the individual who is the employer; management bodies of a legal organization or persons authorized by them, other persons authorized to do so in accordance with federal law, in the manner established by the Labor Code of the Russian Federation, other regulatory legal acts of the Russian Federation, laws and other regulatory legal acts of constituent entities of the Russian Federation, regulatory legal acts, acts of local self-government bodies, constituent documents of a legal organizations and local regulatory acts.

Consequently, a law enforcement check of the existence of such powers may require recourse not only to the Labor Code of the Russian Federation, other federal laws, but also to local regulatory acts. The conclusion of an agreement on the termination of labor contract on behalf of an employer by an unauthorized person cannot indicate the actual will of this party to the labor contract. From the point of view of the protection of the labor rights of the employee, at first glance, this circumstance does not seem significant due to the employee's right to dismiss at his own will. However, if the conditions for additional guarantees and compensations are included in the agreement on the termination of the labor contract upon the termination of the labor contract, the invalidity of the agreement on the motive of imprisonment by an unauthorized person shall lead to negative consequences for the employee.

The question of the form of such an agreement in the Labor Code of the Russian Federation is left open, and therefore both oral and written form is hypothetically possible. In the meantime, in the event of a dispute, compliance with the written form of the agreement will certainly prove the existence of such an agreement. And, it seems, it is necessary to agree with those scientists who offer various variants of the written form: an additional agreement to the labor contract; the employer's resolution on the employee's written statement of dismissal by agreement of the parties; order (instruction) of the employer on termination of the labor contract for this reason, signed by the employee with the expression of consent to terminate the contract by agreement of the parties.

The lack of specific instructions in the Labor Code of the Russian Federation proves that a legally significant fact does not recognize which of the parties initiates the conclusion of such an agreement. Thus, the agreement can be concluded at the suggestion of the employee, the employer, or take place due to the simultaneous initiative of the parties to the labor contract.

However, unlike the termination of an labor contract on the initiative of one of the parties when concluding the said agreement, the initiator can not unilaterally refuse to execute such an agreement, that is, from the termination of the labor contract. Such a right does not belong to the party who is not the initiator of the conclusion of an agreement on termination of the labor contract. It should be noted that the Labor Code of the Russian Federation does not explicitly prohibit a unilateral refusal of an agreement, however, taking into account the legal nature of the agreement, which is the result of a compromise, the agreed will of two equal subjects of law, giving the right to a unilateral refusal of such an agreement would contradict legal nature of the agreement would exclude stability and predictability in such a matter of principle as termination of the labor contract.

A similar point of view is shared by the Plenum of the Supreme Court of the Russian Federation, which is reflected in paragraph 20 of the resolution, by virtue of which, when an agreement is reached between an employee and an employer, an indefinite-term or fixed-term labor agreement can be terminated at any time determined by the parties. The cancellation of the agreement regarding the term and the grounds for dismissal is possible only with the mutual consent of the employer and the employee.

4. CONCLUSION

The indicated explanation of the Plenum of the Supreme Court of the Russian Federation expressly prohibits the cancellation unilaterally of an agreement on the term and on the grounds for dismissal. However, as mentioned above, the agreement may contain conditions for additional guarantees and compensations to the employee upon dismissal. In this regard, the question arises whether the ban on unilateral refusal extends to these conditions? It seems that such a prohibition applies

to all the conditions of the agreement, since they are interrelated and for each of them, the parties agreed to the will.

It should be noted that the Definition of the Judicial Collegium for Civil Cases of the Supreme Court of the Russian Federation dated December 6, 2013 No. 5-KG13-125 contains a judgment testifying to an extensive (in comparison with the point of view stated in the aforementioned decision of the Plenum of the Supreme Court of the Russian Federation) ban on unilateral refusal. As follows from the said Definition, when agreeing on the terms of termination of an labor contract, the employer accepted the conditions specified by the employee by signing a corresponding agreement providing for the payment of monetary compensation in connection with the dismissal by agreement of the parties; the employee's right to be dismissed on the terms and conditions offered to them corresponds to the employer's right to refuse the employee dismissal under these conditions and offer him to continue working or resign for other reasons, however, since the employee's will is dismissed by agreement of the parties on certain conditions, the employer does not have the right to decide on the conditions of dismissal of an employee.

The only exception to the general rule on the inadmissibility of a unilateral refusal to execute an agreement on termination of labor relations is the refusal of a pregnant woman to fulfill these obligations, provided that at the time of the conclusion of such an agreement the woman did not know about her pregnancy. Such an exception is indicated in the Definitions of the Supreme Court of the Russian Federation of June 20, 2016 No. 18-KG16-45; dated September 05, 2014 № 37-КГ14-4.

Thus, the agreement of the parties on the termination of the labor contract is a universal basis for the termination of the labor contract, expressed in writing by a voluntary, agreed will of the parties to the labor contract to terminate the labor contract on a specific date. The named agreement may contain additional conditions that should not worsen the legal status of the employee and should not contradict the current legislation.

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