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BEZPRAWNA ODMOWA PRZYJĘCIA PRACY JAKO PODSTAWA NAPRAWIENIA SZKODY NIEMAJĄTKOWEJ

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Adnotacja. Celem artykułu jest rozważenie specyfiki nielegalnej odmowy zatrudnienia osoby jako podstawy odszkodowania za szkody moralne. W trakcie badań ustalono, co uważa się za nieuzasadnioną odmowę przyjęcia pracy. Ustala się, w jakich przypadkach pracodawca może, bez naruszania wymogów prawa pracy, odmówić zatrudnienia osoby. Szczegółowo zbadano podstawy prawne odmowy zatrudnienia. Udowodniono, że brak wolnych miejsc pracy jest bezwarunkową przyczyną odmowy. Należy zauważyć, że Kodeks pracy Ukrainy przewiduje odmowę potencjalnemu pracownikowi w przypadku niewystarczających kwalifikacji lub braku niezbędnych kwalifikacji zawodowych. Rozważa się specyfikę zatrudniania osoby, biorąc pod uwagę stan jej zdrowia, a także specyfikę zatrudnienia osób niepełnosprawnych.
Słowa kluczowe: odmowa niezgodna z prawem, odmowa zgodna z prawem, zatrudnienie, potencjalny pracownik, szkoda moralna.

UNLAWFUL REFUSAL OF EMPLOYMENT AS A BASIS FOR COMPENSATION FOR MORAL DAMAGE

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Abstract. The purpose of the article is to consider the peculiarities of the illegal refusal of employment as a basis for compensation for moral damage. In the process of research, it was found out what is considered an unreasonable refusal to hire a person. It is established in which cases the employer can, without violating the requirements of labor legislation, refuse to employ a person. The legal grounds for refusal of employment have been investigated in detail. It is proven that the lack of vacancies is an unconditional reason for refusal of employment. It is noted that the Labor Code of Ukraine provides for the refusal of a potential employee in case of insufficient qualifications or lack of the necessary professional qualities. The peculiarities of hiring person, considering the state of his health, as well as the specifics of employment of disabled people, are considered.
Key words: illegal refusal, legal refusal, employment, potential employee, moral damage.

НЕЗАКОННА ВІДМОВА У ПРИЙНЯТТІ НА РОБОТУ ЯК ПІДСТАВА ДЛЯ ВІДШКОДУВАННЯ МОРАЛЬНОЇ ШКОДИ

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Анотація. Метою статті є розгляд особливостей незаконної відмови у прийнятті особи на роботу як підстави для відшкодування моральної шкоди. У процесі дослідження було з'ясовано, що вважається необґрунтованою відмовою у прийнятті на роботу. Встановлено, в яких випадках роботодавець може, не порушуючи вимог трудового законодавства, відмовити особі у прийнятті на роботу. Детально досліджено законні підстави для відмови у прийнятті на роботу. Доведено, що відсутність вакантних місць є безумовною підставою для відмови. Зауважено, що у КЗпП України передбачена відмова потенційному працівникові у випадку його недостатньої кваліфікації чи відсутності необхідних професійних якостей. Розглянуто особливості прийняття на роботу особи, враховуючи стан її здоров'я, а також специфіку працевлаштування інвалідів.
Ключові слова: незаконна відмова, законна відмова, працевлаштування, потенційний працівник, моральна шкода.

Introduction. One of the most important among the guaranteed socio-economic rights of the citizens of our country is the right to work, which lies in a person's free choice of type of activity in accordance with the preferences, abilities and skills. The principle of freedom of labor enshrined in the Constitution of Ukraine reflects the international approach to this issue. In particular, set forth in Art. 23 of the Universal Declaration of Human Rights of 1948 enshrined the right to work, to free choice of place of work, to fair and favorable working conditions and to protection against unemployment. The International Covenant on Economic, Social and Cultural Rights of 1966 stipulates the right of every person to obtain the opportunity to gain his living by work which he freely chooses or accept.

Therefore, each person independently decides whether to work or not, chooses a job that meets his requirements and criteria, the type and form of his employment. However, it does not mean that he will be guaranteed employment in any chosen enterprise (institution, organization), because the employer also has the right to select personnel who, by their business and moral qualities, correspond to the proposed positions and possess sufficient knowledge and skills to professionally and promptly perform the tasks set before them. Indeed, labor relations between an employer and an employee arise based on an employment contract, which specifies in detail the rights and obligations of the parties, as well as all necessary working conditions (location, schedule, payment, etc.).

At the same time, the labor legislation prohibits unjustified refusal of employment, that is, a refusal without any reasons or for reasons that do not relate to the qualifications or professional qualities of the employee, or for other reasons not provided for by law (Article 22 of the Labor Code of Ukraine) (Law of Ukraine No. 322-VIII, 1971). The State also guarantees legal protection in case of unjustified refusal of employment.

Illegal refusal to a potential employee may be grounds for compensation for moral damage because the Labor Code does not contain any restrictions or exceptions for compensation for moral damages in case of violation of the labor rights of employees.

Main part. The purpose of the article is to consider the specifics of an illegal refusal to hire a person as the basis for compensation for moral damage. To achieve it, it is necessary to perform the following tasks: to find out what is considered unjustified refusal of employment; to establish, and in which cases the employer can, without violating the requirements of labor legislation, refuse to hire a person; to investigate in detail the legal grounds for refusal of employment (lack of vacancies; insufficient qualifications or lack of necessary competencies; restrictions established by law; health status of the person).

Materials and Methods. Such scientists as V. Ya. Buriak, V. S. Venediktov, O. Yu. Drozd, M. I. Inshyn, R. I. Kovalenko, P. D. Pylypenko O. V. Tyshchenko, O. M. Yaroshenko and others devoted their research to the problem of protecting the rights of employees when concluding an employment contract.

However, new socio-economic conditions of our life, the challenges facing modern society, the European integration processes currently taking place in our country, require the search for new approaches to solving the issue of protecting the rights of the employee, in particular, when applying for a job.

The following methods were used when preparing the Article. Dialectical method helped to figure out what is considered an unjustified refusal of employment. Monographic method was useful when reviewing the works by the scholars studying the issue under consideration. Logical method made it possible to identify the grounds for lawful refusal of employment. With the help of normative and dogmatic method legal instruments governing the question under discussion. Legal modeling method was applied to make the relevant conclusions and suggestions.

Results and Discussion. The Basic Law and labor legislation of Ukraine prohibit unjustified refusal to hire a person. The scientists concluded that refusal to accept a job, which is not motivated or motivated by references to circumstances other than employee's business qualities, is unjustified in the presence of a vacant workplace (position). Taking into account the practice, an unjustified refusal should be considered: first, an illegal refusal, the reasons for which are prohibited by law; secondly, the one that does not relate to the professional and business qualities of the person being hired; thirdly, unmotivated refusal, i.e. refusal without reference to any reasons (including legal ones) (Rotan, Zub & Sonin, 2010).

General prohibition of unreasonable refusal of employment, enshrined in Art. 22 of the Labor Code of Ukraine, is specified in a number of articles of this and other legal instruments. Thus, according to the provisions of Part 5, Art. 24 of this codified act, a person invited to work on transfer from another enterprise, institution, organization by agreement between the heads cannot be refused an employment contract. It is also prohibited to refuse employment to women and to reduce their wages for reasons related to pregnancy or the presence of children under the age of three, and single mothers – due to the presence of a child under 14 or a child with a disability. In case of refusal to hire women of the specified categories, the employer is obliged to inform them of the reason for the refusal in writing. Refusal of employment can be challenged in court.

According to Art. 11 of the Law of Ukraine "On the basic principles of social protection of labor veterans and other elderly people in Ukraine" (Law of Ukraine No. 3721-XII, 1993), elderly people have the right to work on an equal basis with other citizens, and therefore it is prohibited to refuse to hire and dismiss an employee at the initiative of the owner or a body authorized by him on the grounds of reaching retirement age.

Refusal that violates the principle of equality in the rights of all persons, enshrined in Art. 1 of the Universal Declaration of Human Rights and Art. 21 of the Constitution of Ukraine, will also be considered illegal.

O. M. Yaroshenko (2019, p. 147) believes that an employer can, without violating the requirements of labor legislation, refuse to hire a job seeker only in such cases as:

a) lack of vacancies;

b) insufficiency or lack of proper qualification of the job applicant;

c) the presence of restrictions established by legislation regarding hiring (age, difficult or harmful working conditions, a court-ordered ban on holding certain positions, work of close relatives, health status);

d) restrictions based on medical indicators (when the employee is unable to perform certain work due to his health). In all other cases, refusal to hire an employee should be considered as contrary to labor legislation.

Sharing the scientist's point of view on this issue, we offer to make the specified provisions a little more specific.

As for the lack of vacancies as a legal reason for refusal of employment, it was emphasized by all researchers who considered this issue. We agree with their opinion, because it is impossible to hire a person if there are no vacant positions for which he can be employed.

This view is also confirmed by judicial practice. For example, based on the materials of the case No. 2-144/2008, PERSON_1 filed a lawsuit against the Agrarian Lyceum declaring unlawful the refusal to accept a job and the obligation to enter into employment with him. In the substantiation of the lawsuit, he stated that on August 17, 2007, he applied to the director of the lyceum with a request to hire him as a teacher of special disciplines from September 01, 2007. The director of the lyceum refused him, informing him by letter that, owing to the failure to implement the plan to recruit students to the lycée, there are no available jobs. PERSON_1 considers the refusal illegal, motivated by the fact that he is the only one who has significant professional experience in teaching. He had been the head of the lyceum for a long time, well versed in agriculture and can teach it to others. He considers the criticism of the lyceum management in the past to be the reason for the refusal (Case No. 2-144, 2008).

The court found that when refusing PERSON_1 to hire him, the director was guided by the provisions of the lyceum Charter, the terms of the contract and the current labor legislation. In accordance with Clause 5.3.4 of the Charter, the director appoints and dismisses lyceum employees, forms the teaching staff. The fact of the full workload for 2007 – 2008 of the lyceum employees is confirmed by the certificate. Considering the above, the court considers the refusal to hire PERSON_1 justified. The court does not take into account the plaintiff's statement that the defendant was obliged to conclude an employment contract with him as the employee who has extensive practical, professional and managerial experience in the lyceum, because this is a subjective statement of the plaintiff, which is not based on the requirements of the labor legislation that clearly defines which correctly defines the grounds for the prohibition of refusal of employment (Case No. 2-144, 2008).

As follows from the provisions of the Constitution of Ukraine (Law of Ukraine No. 254k/96-VR, 1996), any direct or indirect limitation of rights or establishment of direct or indirect advantages when concluding, changing or terminating an employment contract depending on origin, social and property status, race and nationality, gender, language, political views, religious beliefs, membership in a trade union or other association of citizens, type and nature of occupations, place of residence are not allowed.

At the same time, the Basic Law of Ukraine, as well as number of other legislative acts establish restrictions on employment. For example, Art. 127 of the Constitution of Ukraine states that a citizen of Ukraine who is no younger than 30 and no older than 65 may be appointed to the post of judge (Law of Ukraine No. 254k/96-VR, 1996). According to Art. 19 of the Law "On Public Service" (Law of Ukraine No. 889-VIII, 2015) adult citizens of Ukraine have the right to public service. According to Part 1 of Art. 38 of the Law "On Comprehensive General Secondary Education" (Law of Ukraine No. 463-IX, 2020), the head of a general secondary education institution may be a person who is a citizen of Ukraine, speaks the State language, etc.

Besides, the Labor Code of Ukraine provides for the refusal of a potential employee in case of lack of qualifications or competencies. Providing its explanations on this basis, the Ministry of Social Policy emphasizes that the level of education for the position is determined in accordance with the profession code and the name of the classification group, that is, the complexity and responsibility of the work performed, as well as the qualification requirements established by the qualification characteristics. In particular, the section "Qualification requirements" defines requirements for educational, qualification level, minimum length of service for a certain position (Letter of the Ministry of Social Policy No. 352/13/116-16, 2016).

It should be noted that on May 31, 2017, the Cabinet of Ministers of Ukraine approved the Procedure for the development, implementation and revision of professional standards, which establishes general requirements for the procedure for development, public discussion, approval, implementation, revision and amendments to professional standards (Resolution of the Cabinet of Ministers of Ukraine No. 373, 2017). Professional standards projects can be developed by employers, their organizations and associations, industry councils, state authorities, scientific institutions, public associations, other interested entities depending on the employers' need for qualified labor, its distribution by workplaces, forms employment and working conditions for a separate profession (type of occupation) for which a professional and/or partial professional qualification is assigned, or for a group of related professions (types of occupation) in a certain field of professional activity. Methodological recommendations for the development of professional standards are prepared by the National Qualifications Agency and published on its official website.

In addition to professional standards, qualification characteristics apply in Ukraine. The Guide on Qualification Characteristics of Professions is a collection of descriptions of types of labor activity in Ukraine systematized by types of economic activity to use the qualifications of employees in institutions and organizations. It defines the list of basic works that are characteristic of one or another position and defines the qualification requirements for certain positions. The Guide includes 87 thematic issues, as well as 4 additional qualification handbooks.

As A.M. Yushko (2018, p. 93) correctly pointed out, both professional standards and guides of qualification characteristics are regulatory documents that are mandatory for application along with the rules of the Labor Code of Ukraine and other regulatory legal acts of Ukraine in the field of labor and education.

Certain requirements regarding qualifications and professional qualities are provided for directly in legislative acts. Thus, Art. 20 of the already mentioned Law of Ukraine "On Public Service" (Law of Ukraine No. 889-VIII, 2015) establishes requirements for persons applying for entry into civil service. For example, a total work experience of at least seven years is provided for category "A" positions; fluency in the state language, proficiency in foreign language, which is one of the official languages of the Council of Europe.

According to Part 2, Art. 35 of the Law of Ukraine "On Higher Education" (Law of Ukraine No. 1556-VII, 2014), the head of a faculty (educational and scientific institution) must have a scientific degree and/or a scientific (honorary) title, usually according to the profile of the faculty or institution. Teaching posts are filled by persons with pedagogical education, higher education and/or professional qualification, are fluent in the state language (for citizens of Ukraine) or proficient in the State language sufficient to communicate (for foreigners and stateless persons), moral, physical and mental health characteristics of whom allow them to perform professional duties (Part 1, Article 22 of the Law “On Comprehensive General Secondary Education”) (Law of Ukraine No. 463-IX, 2020).

Besides, the law establishes some restrictions on hiring, designed to ensure labor protection. Thus, Art. 174 of the Labor Code of Ukraine prohibits to employ women in heavy work and in work with harmful or dangerous working conditions, as well as in underground work, except for some underground work (non-physical work or work on sanitary and household maintenance) (Law of Ukraine No. 322-VIII, 1971).

In 1994, the List of heavy jobs and jobs with harmful and dangerous working conditions, in which the employment of women is prohibited, was adopted and approved by the order of the Ministry of Health of Ukraine. However, in 2017, this legal act was canceled (except for Chapter 3 of Section I of the List) due to the fact that that it contradicts the requirements of European Union legislation and Ukraine’s international obligations on gender equality.

In addition, it is forbidden to involve women in lifting and moving things, the weight of which exceeds the limits set for them. The limit norms for lifting and moving heavy objects by women were approved by the Resolution of the Ministry of Health of Ukraine No. 241 (1993). Such limits are the lifting and movement of goods (with the weight of containers and packages): on duty with other work (up to 2 hours) – 10 kg, constantly during the work shift – 7 kg. The total weight of cargo that is moved during each hour of the work shift should not exceed: from working surface (table conveyor, machine level) – 350 kg, from floor – 175 kg.

The employment of minors in heavy work and work with harmful and dangerous working conditions is prohibited as well. The employment of minors in industries, professions and jobs with difficult and harmful working conditions is prohibited at all enterprises, institutions and organizations, regardless of the forms of ownership and types of their activities (Resolution of the Ministry of Health of Ukraine No. 46, 1994).

Important in the context of the question under consideration is the instruction fixed in clause 3, Part 1, Art. 19 of the Law of Ukraine "On Public Service" (Law of Ukraine No. 889-VIII, 2015) regarding the impossibility of appointing to the position of a civil servant a person convicted of a premeditated criminal offence, if the conviction has not been expunged or withdrawn in accordance with the procedure established by law. Unfortunately, there is no special list of crimes for which a criminal record is officially recognized as incompatible with public service. This issue should be resolved taking into account the nature of the crime committed by the person and taking into account Art. 4 of the specified Law. In this regard, V. H. Rotan and I. V. Zub (2010) note that civil servant can be a person whose reputation would not cause citizens to assume that he is biased, unobjective, or prone to illegal or immoral behavior. In this regard, it should be recognized that conviction for any serious crime results in that a person with the criminal record may not be deemed to have a reputation compatible with being in the public service, and therefore the restrictions set by the abovementioned law apply to all persons with a criminal record for serious crimes.

Similar prescriptions are also contained in Clause 3, Part 6, Art. 27 of the Law of Ukraine "On the Prosecutor’s Office" (a person with an unfit criminal record or administrative penalty for the corruption-related offence may not be appointed as a prosecutor) (Law of Ukraine No. 1697-VII, 2014); Clause 4, Part 1 Art. 23 of the Law of Ukraine "On the State Secret" (admission to state secrets is not granted if the citizen has a criminal record for serious or particularly serious crimes or for committing a criminal offense against the foundations of national security of Ukraine, not redeemed or withdrawn in due course) (Law of Ukraine No. 3855-XII, 1994).

Examples given are not exhaustive – the legislator imposed restrictions on persons with criminal records to choose certain professions (lawyer, notary, etc.).

Restrictions on holding certain positions or engaging in certain activities may be established by a court decision regarding the relevant person. According to Clause 3, Part 1, Art. 51 of the Criminal Code of Ukraine (Law of Ukraine No. 2341-III, 2001), disqualification from certain positions or activities may be applied by the court to persons found guilty of an offence. If the head of the enterprise concludes an employment contract with such a person, he may breach the provisions of Article 382 of the Criminal Code of Ukraine ("Non-execution of a court decision"). In order to prevent the employment of a person who has been deprived of the right to hold certain positions by a court decision, it is advisable to ask about the presence of a criminal record of the person being hired, as well as offer to provide (with his consent) a certificate of the presence (absence) of a criminal record (Anastasov, 2020).

The legislator also provided for some other restrictions on employment. Thus, the Ministry of Health of Ukraine and the Security Service of Ukraine approved the List of mental illnesses (disorders) that can harm the protection of state secrets and in the presence of which a citizen is not granted access to State secrets (Resolution of the Ministry of Health of Ukraine and the Security Service of Ukraine No. 174/136, 2002). Accordingly, persons diagnosed with disorders enshrined in the List cannot hold positions related to access to State secrets.

There are also restrictions on the joint work of close relatives. Thus, according to Art. 27 of the Law of Ukraine "On Corruption Prevention" (Law of Ukraine No. 1700-VII, 2014), persons authorized to perform the functions of the state or local self-government may not have direct authority over persons close to them or be directly subordinate to them.

At the same time, close persons are family members of a person, as well as husband, wife, father, mother, stepfather, stepmother, son, daughter, stepson, stepdaughter, brothers and cousins, sisters and cousins, brother and sister of the wife (husband), nephew, niece, maternal uncle, maternal aunt, grandfather, grandmother, great-grandfather, great-grandmother, grandson, granddaughter, great-grandson, great-granddaughter, son-in-law, daughter-in-law, father-in-law, mother-in-law, father-in-law, mother-in-law, father and mother of the son's (husband's) wife (daughters), adopter or adoptee, guardian or custodian, person who is under the guardianship or care of the specified subject Law of Ukraine No. 1700-VII, 2014).

Direct subordination is the relationship of direct organizational or legal dependence of a subordinate on his manager, including through the decision (participation in the decision) of hiring, dismissal, application of incentives, disciplinary sanctions, instructions, orders, etc., monitoring their implementation.

Persons applying for positions related to the performance of the functions of the state or local self-government are required to inform the management of the body in which they are applying about persons close to them working in this body to be transferred or, if not possible, – dismissed (Law of Ukraine No. 1700-VII, 2014).

Regarding hiring a person, taking into account his health, the Order "On the approval of the Procedure for conducting medical examinations of employees of certain categories", which defines the procedure for conducting preliminary (at the time of hiring) and periodic (during employment) medical examinations of workers engaged in heavy work, work with harmful or dangerous working conditions or those or where there is a need for professional selection, annual compulsory medical examination of persons under 21, should be mentioned. The Procedure, in particular, states that when deciding on the suitability for work of a particular employee during the preliminary medical examination, the Commission is guided by medical contraindications defined in the List of harmful and dangerous factors of the production environment and labor process.

The issue of suitability for work is decided individually in each case, taking into account the peculiarities of the functional state of the body (character, degree of manifestation of the pathological process, presence of chronic diseases), working conditions and the results of additional examination methods (Resolution of the Ministry of Health of Ukraine No. 246, 2007).

There are certain peculiarities in the case of employment of disabled people. Thus, in accordance with Part 2 of Art. 24 of the Labor Code of Ukraine, in the cases provided for by the law, when applying for a job, a citizen is required to submit a document on his health. In particular, this applies to persons with disabilities, because it is prohibited to enter into an employment contract with a citizen who, on medical advice, is offered work that is contraindicated his state of health. A similar norm is contained in part 3 of Art. 17 of the Law of Ukraine "On the Basics of Social Protection of Persons with Disabilities in Ukraine" (Law of Ukraine No. 875-XII, 1991), according to which a person's refusal to conclude an employment contract on the grounds of disability is not allowed, except for cases when, according to the conclusion of a medical and social examination, his state of health prevents him from performing professional duties, endangers health and safety of work of other persons, or continuing or changing the nature and volume of work is likely to deteriorate health.

Disability as a measure of loss of health is determined by an expert examination in the medical and social examination bodies of the central executive body, which ensures the formation of the State policy in the field of health care. The document that confirms disability and contains a conclusion about the conditions and nature of work is a certificate from the medical and social expert commission, which is issued in the relevant form (Resolution of the Ministry of Health of Ukraine No. 577, 2012). Without such a certificate, employment of this category of persons is impossible, because the employer will not be able to guarantee safe and non-harmful working conditions, as well as provide other social and economic guarantees granted by law.

Conclusions. Thus, in this article, we established that the Basic Law and the labor legislation of Ukraine prohibit unjustified refusal to hire a person. The general provision regarding the prohibition of unjustified refusal to hire, enshrined in Art. 22 of the Labor Code of Ukraine, specified in a number of articles of this and other normative legal acts. Having researched the opinions of scientists who examined this issue, we established that the grounds for a legal refusal to hire are:

a) lack of vacancies at the enterprise (institution, organization). The legality of the refusal in connection with this circumstance is confirmed both by the theory of labor law and by judicial practice.

b) insufficient qualification or lack of necessary professional qualities (the level of education for the post is determined according to the job code and the name of the classification group, that is, the complexity and responsibility of the work performed, as well as the qualification requirements established by the qualification characteristics);

c) restrictions established by legislation (age-related; related to the labor protection of women and youth; inability to appoint to certain posts persons with an outstanding or unexpired criminal record; regarding the joint work of close relatives);

d) state of health. Suitability for work in this case is decided individually, taking into account the peculiarities of the functional state of the body (character, degree of manifestation of the pathological process, presence of chronic diseases), working conditions and the results of additional examination methods.

All other cases of refusal to hire an employee should be considered illegal; in their presence, the person has the right to demand compensation for the damage caused. Thus, a person is entitled to apply to the court for

the protection of his right, because in fact directly in the courts are considered not only disputes about refusal to hire workers invited to take up a job under a transfer from another organization, young specialists and pregnant women, women who have children under the age of three or a child with a disability, but any person who believes that he has been refused an employment contract contrary to the guarantees provided for in Art. 22 of the Labor Code. In the application, the victim, among other things, has the right to demand compensation for moral damages if the illegal refusal led to moral suffering, loss of normal life ties or required additional efforts to organize his life. Clearly, all these facts require proper evidence.

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