Список использованной литературы:

1. Кримінальний процесуальний кодекс України. – Х. : Одіссей, 2013. – 320 с.
2. Уголовно-процессуальный кодекс Украины : науч.-практ. комментарий / под общ. ред. В.Т. Маляренко, Ю.П. Аленина. – Х. : Одиссей, 2005. – 968 с.
3. Закон України «Про оперативно-розшукову діяльність» від 11.08.2013 р. // [Електронний ресурс]. – Режим доступу : http://zakon3.rada.gov.ua/laws/show/2135-12.
4. Шейфер С.А. Следственная власть: история и современность // Уголовная юстиция: связь времен : избранные матер. междунар. науч. конф. (Санкт-Петербург, 6-8 октября 2010 года) / сост. К.Б. Калиновский, А.В. Смирнов. – М. : ЗАО «Актион-Медиа», 2012. – С. 111−119.
5. Головко Л.В. Реформа полиции в контексте модернизации предварительного производства в российском уголовном процессе // Уголовная юстиция: связь времен : избранные матер. междунар. науч. конф. (Санкт-Петербург, 6-8 октября 2010 года) / сост. К.Б. Калиновский, А.В. Смирнов. – М. : ЗАО «Актион-Медиа», 2012. – С. 24−31.
6. Колоколов Н.А. Не ограничится ли реформа предварительного следствия очередной сменой руководства? / Н.А. Колоколов // Уголовное судопроизводство. – 2007. – № 4. – С. 2−14.
7. Баулін О.В. Процесуальна самостійність і незалежність слідчого та їх правові гарантії : автореф. дис. … к. ю. н. : спец. 12.00.09. – К., 2000. – 20 с.
8. Александров А.С. Каким не быть предварительному следствию // Государство и право. – М. : Наука, 2001. – № 9. – С. 54−62.
9. Назаренко В. Практическое значение и перспектива предварительного следствия // Законность. – М., 2001. – № 6. – С. 40−42.
10. Зеленецкий В.С. Уголовно-процессуальные функции следователя // Вісник Луганського інституту внутр. справ МВС України. – 2001. – № 2. – С. 69−78.
11. Семенов К. Процессуальные правоотношения следователя, участников процесса и прокурорский надзор // Юридический вестник. – 1999. – № 3. – С. 87−92.

STUDYING OF LABOR RELATIONSHIP MODEL WITH THE HEAD OF A LEGAL ENTITY ON THE EXAMPLE OF THE EUROPEAN UNION

Karyna MALYNOVSKA,
graduate student department of labor law Yaroslaw
The Wise National Law University

Summary

The article investigates the labor relations with the head of the legal entity on the basis of analysis of the experience of the European Union. This study highlights the characteristics of such relationship in developed countries and uses the positive experience in dealing with the regulatory framework in this area. The article employment contract is regarded as «the cornerstone» of the modern system of labor law in Europe. Particular attention is paid to the principle of freedom of the employment contract. This principle is reinforced by the lack of labor law discrimination and the prohibition of forced labor which is distributed on managers and business entities.

Key words: labor relations, labor contract, the head of the legal entity, the legal status of the worker.

Аннотация

Статья посвящена исследованию трудовых правоотношений с руководителем юридического лица на основании анализа опыта стран Европейского Союза. Данное исследование позволяет выделить характерные особенности такого рода правоотношений в развитых странах и использовать положительный опыт при решении вопросов правового регулирования отношений в данной области. В статье трудовой договор рассматривается как «краеугольный камень» современной системы трудового права Европы. Особое внимание уделяется принципу свободы заключения трудового договора. Этот принцип в трудовом законодательстве подкрепляется отсутствием дискриминации, а также запретом принудительного труда, которые распространяются также на руководителей субъектов хозяйствования.

Ключевые слова: трудовые правоотношения, трудовой договор, руководитель юридического лица, правовой статус работника.

There are relatively few formal procedures governing the hiring process, and few rights are conferred on applicants for employment as opposed to those who are employed, as employees or otherwise. An important issue, however, is that of access to the national labor market of the United Kingdom, which is governed by the Immigration Rules and by the principle of freedom of movement of labor within the European Economic Area. A full treatment of this subject lies outside the scope of this book, but the central principles will be briefly outlined here. Access to a particular employment is subject for the most part to the principle of freedom of contract, but with protection against discrimination on the grounds of sex, race, disability, and membership or non-membership of a trade union. A further area of state intervention in the hiring process is that formed by active labor market policy, which in addition to providing direct employment subsidies of various kinds also extends to certain legal measures which have been designed with a view to their impact on workers and employers incentives. Rules concerning eligibility for social security benefits, for example, have an influence on the individual's decisions to search for work and to accept particular job offers; conversely, a range of measures in the form of taxation, social security benefits, and direct state subsidies aim to provide incentives to employers to hire workers.

Rights of access to the labor market for non-UK citizens are governed by the relevant rules of European Union law for states within the European Economic Area, and by the Immigration Act 1971 and the Immigration Rules for nationals of other countries. The Immigration Rules are not delegated legislation as such but are promulgated and applied under the authority of the Home Office as an aspect of the prerogative power, although under the Immigration Act 1 they must be laid before both Houses of Parliament for their approval [1]. If a resolution of either House is passed within forty days disapproving the proposed Rules, the

Home Secretary is required to make such changes as he or she thinks fit and to re-submit them to Parliament.

The general effect of the Immigration Rules governing employment is to regulate very strictly the supply of foreign labor into the UK. Most non-EEA nationals require a work permit issued by the Department for Education and Employment to work in the UK [2]. Those exempted from this rule fall under a number of miscellaneous categories. In addition to certain seasonal farm workers, exchange teachers, Commonwealth citizens one of whose grandparents was born in the UK, and trainees under the DFEE's Training and Work Experience Scheme, a number of occupations qualify for permit-free employment. These include overseas broadcasters and journalists, sole representatives of foreign-based companies, private servants of diplomatic staff, domestic servants, foreign government employees, and ministers of religion. With the exception of domestic servants, those qualifying for permit-free employment are able, under the Immigration Rules, to move around between jobs, as long as they remain within the general category of employment for which they were given permission to enter [3]. Leave to enter is normally given for an initial period of twelve months, with a subsequent extension for three years; after four years, the individual concerned can apply for indefinite leave to remain.

All other non-EEA nationals seeking employment in the UK require, in principle, a work permit. The general principle behind the granting of a work permit is that the employer must demonstrate that the work in question needs skills which are in acutely short supply within the UK. Moreover, work permits are tied to particular jobs. An employee who needs a work permit cannot change jobs unless the work permit is varied with the consent of the Department for Education and Employment. If he or she loses their job with the initial employer for whatever reason, and either has no other job to go to or is denied permission to change jobs, they also forfeit their rights of residence in the UK. Again, as with permit-free employment, the individual only qualifies to apply for indefinite leave to remain after four years of employment [4], (ti) Citizens of EEA states.

By contrast, for citizens of EEA states – that is to say nationals of EU Member States and of other states which are party to the Agreement on the European Economic Area of 1992 – the rights of free movement of labor, as guaranteed by EU law, apply [5]. Article 8a of the EC Treaty, which was inserted by the Maastricht Treaty on European Union, states that every citizen of the Union shall have the right to move and reside freely within the territory of the Member States subject to the limitations and conditions laid down in this Treaty and by the measures adopted to give it effect. Under Articles 48 and 49 of the Treaty, three rights are established in relation to the free movement of workers: these are the right to enter another Member State for the purposes of employment, which includes the right to enter to look for work; a right to reside in the Member State where the worker has found work or (for a limited period) is seeking work, which may be lost once employment ends, except in certain cases of retirement and incapacity for work; and a right to work on equal terms with the nationals of the Member State concerned [6]. There are a number of general derogations to these rights on the grounds of public policy, public security and public health, which are strictly construed [7].

In relation to access, EC Directive 68/360 requires Member States to grant workers who are nationals of another Member State access to their territory on the production of a valid identity card or passport, without demanding additional documents in the form of entry visas, and to facilitate entry by other family members [8]. The Directive, together with other Community instruments in this area, covers workers, a term broadly defined by the ECJ to include persons engaged in part-time or low-paid work; moreover, the ECJ has said that the term must be given a uniform meaning and should not be independently defined by the different laws of the Member State [9]. The right to enter another Member State for the purpose of seeking work is not clearly stated in the relevant instruments, although social security Regulations at European Community level give migrant workers the right, under certain circumstances, to receive unemployment benefit for up to three months after entering another Member State [10]. In R v Immigration Appeal Tribunal [9] the ECJ held that a right to enter a Member State to search for work was implicit in Article 48 of the EC Treaty and in Article 3 of Directive 68/360, and upheld the UK practice of allowing six months to find a job. The Court ruled that it was lawful to deport a national of another Member State who could neither find work nor show that they had a genuine chance of finding it within, or shortly after, six months of entry.

The right to enter may, in practice, be substantially qualified by the need to comply with frontier controls which seek to establish whether a person has the right which he or she is claiming. The UK is not a party to the Schengen Agreement of 14 June 1985 and related agreements which provide for the abolition of internal frontier controls, that is to say, controls affecting free movement within the European Union. The Treaty of Amsterdam of 1997 incorporated these agreements, known collectively as the Schengen acquits, into the framework of the EC Treaty in such a way that they apply to all Member States with the exception of the UK and Ireland. Nor are the UK and Ireland bound by measures which may be adopted under Title III of the EC Treaty concerning the abolition of internal frontier controls [11], although they do have the right to opt into them at some future point. The autonomy of the IJK in this respect is further reinforced by a Protocol to the EC Treaty, also agreed at Amsterdam [12], which provides that nothing in the free movement provisions of the Treaty shall prevent the UK from exercising frontier controls for the purposes of determining, first, whether persons who are citizens of KEA states or their dependents have the right to enter the UK under Community law, and, second, whether any other persons have the right to enter the UK. The Protocol also preserves the common travel area between the UK and Ireland, under which citizens of the two countries have reciprocal rights of access free of controls which apply to citizens of other states, citizens of other KEA states included. Conversely, the other EU Member States, which make up the Schengen area, are entitled to impose frontier controls on persons seeking to enter their territory from the UK and Ireland.

With regard to residence, EU law requires the issue of a residence permit to workers entering a Member State who already have a confirmation of employment from an employer in that

territory in relation to a job expected to last at least twelve months, and residence rights extend to members of the worker's immediate family. Directive 68/360 [13] requires the residence permit to be valid for five years, to cover the whole territory of the Member State and to be automatically renewable for a further five years. As a result of this provision, citizens of EEA states enjoy superior rights to those applying to other foreign workers within the UK. A citizen of an EEA state may take any work once he or she is in the territory of the UK, and has automatic rights to the extension of their residence permit as long as they are in employment. If such a worker becomes involuntarily unemployed, he or she does not necessarily lose their rights of residence, but upon the first renewal of the residence permit a time limit of a further twelve months may be placed upon their right to reside [14]. The position of a person who becomes voluntarily unemployed is not spelled out but by implication he or she could presumably be regarded as a new entrant, and hence required to find another job according to the principles outlined above. It is implicit in the 1968 Directive that the right of residence will also be lost by an absence of longer than six months, since it is stated that the right may not be lost for an absence of less than six months [15]. Special provisions apply for the issue of temporary residence permits issued to fixed-term contract and seasonal workers, and to the case of frontier workers and short-term workers employed for less than three months, for whom the normal requirement of a residence permit may be dispensed with [13]. The right of a citizen of an EEA state to work on equal terms with the indigenous workers of the Member State is enshrined by Article 48 (2) of the EC Treaty and by Regulation 1612/68. In addition to providing for equal treatment for workers' families, these provisions are concerned with ensuring equality of access to jobs and equality of treatment within jobs. They provide freedom of access in the sense that other nationals of other Member States must be free to receive and to take up offers of employment without discrimination, and must receive the same support from the state employment services as indigenous workers. In addition, equality of treatment requires the removal of all laws attaching different terms to the contracts of overseas workers, and provision for equal access to training, trade union membership and representation rights, and social security benefits and fiscal subsidies [16]. The regulatory effect of immigration controls was further reinforced by the passage of the Asylum and Immigration Act 1996, which makes it an offence punishable by a fine for an employer to employ a person who has not been granted leave to enter or remain in the United Kingdom, or in the case of one who has been granted leave, whose leave is no longer subsisting or whose right to take up employment is subject to a condition which he or she does not satisfy. The employer has a defense in a number of situations, including where, prior to the employment beginning, there was produced to the employer a document which appeared to him to relate to the employee and to be of a description specified in an order by the Secretary of State, and the employer retained the document or a copy of it. However, this defense is not available where the employer (in practice the relevant senior employee) knew that tin employment was in breach of immigration law.

This part of the Act had a controversial passage, for two reasons. First, n places an onerous obligation upon employers who may not always be in a good position to ascertain the significance of documents which are offered to them as proof of an individual's right to work in the United Kingdom. In the case of certain individuals who are exempt from the need for a work permit, the only proof of the right to work may be their passport [17], but the effect of this may be apparent only by applying a detailed knowledge of the Immigration Rules and law. The relevant rules of immigration law are subject to periodic changes, making the position of the potential employer even more problematic.

Second, the Act can be seen as imposing a set of obligations upon employers which will make them more reluctant to employ individuals who appear not to have United Kingdom citizenship, and to that extent, will have an adverse impact upon particular racial groups. Arguably, then, it may encourage behavior by employers which is racially discriminatory. However, it is not clear that an employer who refuses to employ an individual because of doubts over his or her right to work thereby commits an act of racial discrimination. In Dhatt v McDonald's Hamburgers Ltd, a case decided prior to the passage of the 1996 Act, the Court of Appeal held that no breach of the Race Relations Act 1976 had occurred in a case where an employee, who was born in India and held Indian citizenship, was dismissed for failing to convince his employer that he had the right to take up employment in the UK. The evidence offered by the employee, namely his passport stamped with the words given leave to enter the United Kingdom for an indefinite period, should have been adequate to establish his right to work, had the employer been aware of the relevant principles of immigration law. However, the Court held that the complainant had not been the subject of direct discrimination against him on the grounds of his race. It was also suggested that if the case were to be viewed as one of indirect discrimination, the steps taken by the employer would provide a defense of justification [18]. This second aspect of the judgment seems particularly questionable. It could be said that the employer in this case did not take adequate steps to ascertain the correct legal position.

If a similar case to Dhatt were to arise again after the 1996 Act, an employer would have a defense against criminal liability where the employee had presented, prior to the beginning of the employment, a document of the type, specified by order, which established his or her right to take up the employment in question. Given the existence of this defense, as well as the availability of a 24-hour telephone advice line on matters on immigration law which is made available to employers by the Department for Education and Employment, it is arguable that an employer would not be justified in dismissing or refusing to hire an individual on the grounds of their ethnic origin or nationality when they were, objective, entitled to work. However, a more difficult question is whether an employee from a minority ethnic group can claim to have been the victim of racial discrimination where he or she is required, by a potential employer, to take steps to establish their right to work. It is conceivable that an employer could claim that such steps were justified by the combined effect of the immigration rules and the threat of prosecution under the 1996 Act. Nevertheless, it would be stretching

this principle a long way to allow the employer to impose such requirements upon an employee who could show that he or she held UK citizenship (Dhatt, it must be remembered, was not such a case).

Discrimination in hiring is prohibited by statute only in relation to a number of specified criteria. In particular, decisions may not be based on the sex, race, or disability of the applicant. A wide range of regulations which formerly excluded women workers from certain jobs on health and safety grounds were repealed in the 1980s, leaving only a few such exclusions in place; a large body of regulations restricting the employment of children below the school leaving age remains in force. These provisions are considered in more detail in later chapters. Legislation also forbids employers to hire or to refuse to hire an individual on the basis of their current membership or non-membership of a trade union. The principal aim behind the introduction of this legislation was to restrict the operation of the pre-entry closed shop.

Additionally, an employer may not refuse to hire an individual on the basis of a spent conviction as that is defined by the Rehabilitation of Offenders Act 1974 [19]. The Act does not provide any explicit civil remedy for such discriminatory action by an employer; there is no provision for damages to be awarded to a disappointed job applicant, nor for the employer to be required to hire him or her. The Act does provide, however, that the individual is permitted to conceal a spent conviction in answer to a question put to them by a prospective employer, and that the person questioned shall not be subjected to any liability or otherwise prejudiced in law by reason of any failure to acknowledge or disclose a spent conviction. In effect, then, those who go on to become employees are protected by the general law relating to dismissal: tin employer may not later lawfully dismiss them if it should emerge that they lied about the spent conviction prior to being hired. Such a dismissal would be both a breach of contract at common law and equivalent to being an automatically unfair dismissal for statutory purposes. However, if an individual gives a misleading answer in relation to a conviction which is not spent, he or she commits a misrepresentation which renders the contract voidable at common law. It is also unlikely that an employer who finds out about such a conviction would be regarded as committing an unfair dismissal if it decided to terminate the employment [20].

Outside these areas of statutory intervention, the common law principle of freedom of contract applies: an employer is free to refuse to hire a person for any reason, no matter how capricious, or for no reason at all. British Labor law has no equivalent to the provision of the French Labor Code, for example, according to which no person may be excluded from a process of hiring by reason of his origin, sex, customs, family situation, ethnic, national or racial origin, political opinions, trade union activities, religious beliefs, or, unless his lack of capability is medically established by reason of his state of health or any handicap [21].

In the modern period, state direction of labor to particular employments has been implemented only as a temporary measure during periods of national emergency during the two world wars. Regulations providing particular groups with a monopoly in the supply of labor for certain employments, such as the monopoly at one time enjoyed by Registered Dock Workers under the National Dock Labor Scheme, have by-and-large been repealed [22]. A more persistent form of state intervention, however, is constituted by measures designed to influence hiring patterns less directly by providing incentives of various kinds to prospective employers and employees.

Numerous subsidy schemes from the 1970s onwards have sought to protect or to promote employment through the payment of direct or indirect subsidies to employers. From a juridical point of view, the impact of active employment policy has turned out to be rather negligible. The statutes which authorize government departments and other bodies to operate these schemes do so in extremely broad terms, and the detailed rules determining eligibility for the various subsidies have taken the form not of statutory instruments, but of administrative guidance or circulars which are subject to frequent changes. While this leaflet law is of considerable interest in its own right and may give rise to protected legitimate expectations in public law, it has almost completely escaped close judicial scrutiny [23]. From an economic viewpoint, there are difficulties inherent in the process of active labor market policy which go part of the way, at least, to explaining the brief life of most schemes. In the first place, they form a direct and highly visible charge on public expenditure. They also suffer from two related effects which may substantially detract from their effectiveness. One is the deadweight effect, or the tendency for subsidies to support jobs which employers would have created anyway. Then there is the displacement effect, according to which the creation of jobs in the form intended by the subsidy detracts from the creation of other, possibly more permanent forms of employment.

One early form of intervention was the Temporary Employment Subsidy, which consisted of a direct cash grant designed to maintain employment in a number of industrial sectors including textiles. Partly because of pressure from the European Commission which regarded this subsidization as an illicit state aid and hence as a breach of EC competition rules the scheme was phased out and replaced by the Temporary Short-Time Working Compensation Scheme, which, as its name indicates, provided a cash supplement to the wages of workers who were subject to temporary lay-off for lack of work. This scheme operated from 1979 to 1984. During this period the pay of around three million employees was subsidized and around one million jobs threatened with redundancy were maintained, nearly all in manufacturing industry. A feature of the scheme was that small firms were adversely affected by the requirement of the Employment Protection Act 1975 that ten employees had to be threatened with redundancy before the employer was required to inform the Department of Employment. A study carried out by the University of Kent found that the subsidy only postponed and did not avert redundancies in the industries affected; the lack of a clear legal framework for the scheme and for the special employment measures generally were also the subject of criticism [24].

One of the most extensive forms of active labor market policy has been state support for employer-led training. The Industrial Training Act 1964 established statutory bodies at the level of individual industries and sectors, the industrial training boards, consisting of representatives of employers and

trade unions. Most of these bodies were wound up in the 1980s and now only one survives, the Engineering and Construction Industry Training Board. The Employment Services Act 1973 established a government agency, the Manpower Services Commission, which had responsibility for the implementation of training policy; this later gave way to the local-level Training and Enterprise Councils, on which employers (but not trade unions) are represented.

The single most important programme of state intervention during the 1980s and 1990s was the Youth Training Scheme (or, in its later manifestation, Youth Training). This provided a subsidy for employers who took on unemployed young people for training and work experience. In effect, the state subsidy operated as a top-up or addition to wages; the employer had the choice of employing the individual concerned either as a regular employee or apprentice, or as a trainee without a contract of employment. Broadly similar schemes operated for the adult unemployed, although with less flexibility on terms and conditions of employment; under the Training for Work scheme of the mid- 1990s, for example, trainees received a small addition to unemployment benefit and could not qualify for employee status.

The Labor government elected in 1997 announced the replacement of these schemes with the New Deal programme, which started to come into effect from April 1998. The programme applies to those aged between 18 and who have been unemployed for six months or more, and those aged over 24vwho have been unemployed for two years or more. 18-24 year olds are offered a range of options for training and work experience, which include employment with an employer, an Environmental Task Force or a voluntary organization, in each case leading to a recognized qualification, or full-time education for a year, leading to qualification at NVQ level 2 or above. Employers who take on the long-term unemployed qualify for a range of wage subsidies. Refusal to participate in any one of these schemes may lead to disqualification from the receipt of social security benefits.

Bibliography:

1. The European Economic Area (EEA) consists of the Member States of the European Union and of the European Free Trade Area (EFTA).

2. See generally Macdonald and Blake, 1995.

3. Simon Deakin and Gillian S Morris – Ibid: p. 287.

4. Immigration Rules, rule 134; the employer must certify that the individual is still required for the work in question.

5. See the Immigration (European Economic Area) Order 1994, SI 1994/1895.

6. Articles 48 and 49 have direct effect in national law, following the opinion of the ECJ in Case 41/74: Van Duyn v Home Office [1974] ECR 1337.

7. Case 41/74; Van Duyn v Home Office [1974] ECR 1337. Article 48(4) contains an exception for public employment which has also been strictly construed: Case 152/73: Sotgiu v Deutsche Bundespost [1974] ECR 153; Case 149/79: Commission v Belgium (1980] ECR 3881.

8. Directive 68/360, Article 3.

9. Case 53/81: Levin v Staatssecretaris van Justitie [1982] ECR 1035.

10. Reg 1408/71, Article 69(l)(c).

11. Title III, inserted by the Treaty of Amsterdam, provides the Council with power to (among other things) adopt measures for the abolition of all frontier controls affecting the movement of Union citizen and third party nationals within the territory of the Union. The Protocol on the Position of the United Kingdom and Ireland has the effect of excluding the UK and Ireland from the scope of these measures.

12. Protocol on the Application of Certain Aspects of Article 7a of the Treaty establishing the European Community to the United Kingdom and Ireland. See Langrish, 1998.

13. Directive 68/360, Articles 6 and 7.

14. Directive 68/360, Articles, 7. See also SI 1994/1895, para 7.

15. Directive 68/360, Article 6.

16. For a full account, see Nielson and Szyszczak, 1993: pp 71-75, and, in relation to the rules governing co-ordination of social security for migrant workers, see Ogus, Barendt and Wikeley, 1995: ch. 18. The right to remain in residence after retirement or in the case of incapacity arising from employment is governed by Council Regulation 1251/70.

17. Such individuals include those who have been granted indefinite leave to enter and remain in the UK, EEA nationals, and individuals in the categories of permit-free employment as outlined in the text. See Macdonald and Blake, 1995: p 288.

18. On the difference between direct and indirect discrimination, and the role of the justification defence, see below, para 6.3.

19. Rehabilitation of Offenders Act 1974, s 4(3). The Act contains numerous derogations from this principle for particular occupations and the notion of a spent conviction is only applicable to certain offences.

20. Torr v British Railways Board [1977] IRLR 184; and, more generally on pre-contract misrepresentations and dismissal law, see O'Brien v Prudential Assurance Co Ltd 1979) IRLR 140, discussed below, para 5.5.7.

21. Code du Travail, Article L 122-45, as amended by Law No 92-1446 of 31 December 1992.

22. The National Dock Labor Scheme was repealed by the Docks Work Act 1989.

23. Freedland, 1983.

24. Szyszczak, 1990; see also Freedland, 1980.