

Artículo de investigación

Legislative regulation of grounds for dismissal of an employee for committing a corruption or corruption-related offense

Законодавча регламентація підстав для звільнення працівника за вчинення корупційного або пов'язаного з корупцією правопорушення

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Abstract

The article is devoted to the analysis of the current legislation of Ukraine regarding the rationing of grounds for dismissal of an employee for committing corruption or corruption-related offenses. Scientific points of view and relevant provisions of general and specific legislation on the interpretation of such definitions as "corruption", "corruption offense" and "corruption-related offense" are analyzed. The necessity to study this issue is based on the fact that the European integration direction of Ukraine's development is not possible without effective counteraction to corruption as a negative social phenomenon, which impedes the normal functioning of economic relations and civil society in general. In this context, it is emphasized that an employee who has committed a corruption offense and who has been found guilty of such an offense by a court decision, which has come into force, must be dismissed. Attention is drawn to the fact that following a court decision, it is not always possible to dismiss an employee on the ground of a corruption offense, since a person may be dismissed immediately after the administrative protocol has been drawn up against him. *The purpose of the article* is to analyze the current legislation of

Анотація

Стаття присвячена аналізу чинного законодавства України в частині унормування підстав для звільнення працівника за вчинення корупційного або пов'язаного з корупцією правопорушення. Проаналізовано наукові точки зору та відповідні положення загального і спеціального законодавства щодо тлумачення таких дефініцій, як «корупція», «корупційне правопорушення», «правопорушення, пов'язане з корупцією». Необхідність вивчення даного питання зумовлено тим, що євроінтеграційний напрямок розвитку України не можливий без ефективної протидії корупції як негативного соціального явища, що перешкоджає нормальному функціонуванню економічних відносин і громадського суспільства загалом. Наголошується, що працівник, який вчинив корупційне правопорушення, і стосовно якого постановлено судове рішення, яким його визнано винним у скоєнні такого правопорушення, і яке набрало законної сили, має бути звільнений з роботи. Акцентовано увагу на тому факті, що за результатами постановленого судового рішення не завжди можливо звільнити працівника саме з

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Ukraine on the regulation of grounds for dismissing of an employee for committing a corruption or corruption-related offense. *Research methods* are defined taking into account the purpose of the research, which is why modern methods of scientific cognition, namely comparative legal and generalization, are used. The application of these methods made it possible to achieve comprehensiveness and objectivity of scientific research, validity and consistency of the formulated conclusions.

Key words: dismissal, corruption, corruption offense, employee, disciplinary action, cause.

Introduction

The current socio-economic and political situation in Ukraine has led to a significant increase of the level of corruption in our country. This, in turn, has greatly intensified scientific researches devoted to the ways of addressing this problem. However, it is fair to note that scientists have tried to solve this issue through the prism of economic, political, social factors etc. However, almost no one has tried to look at this issue from the point of view of labor law, since corruption involves the commission of certain illegal acts by a person during his employment. Therefore, it is indisputable that the commission of a corruption offense by an official should entail the negative consequences for her, which, in particular, should affect her professional (work) activity.

To date, the problem of corruption has been of concern to various scholars on several occasions. However, despite the considerable amount of scientific research, it should be noted that the vast majority of lawyers have considered this issue from the point of view of administrative law. However, the corruption offense, as a cause for the dismissal of the employee, was left out of the scientists' attention, which should be undoubtedly considered a significant gap on the theoretical and practical levels.

That is why *the purpose of the article* is to characterize corruption offenses as a cause for the dismissal of an employee.

підстави вчинення корупційного правопорушення, оскільки особа може звільнитися відразу після складання щодо неї адміністративного протоколу. *Мета статті* – здійснити аналіз чинного законодавства України з питань регламентації підстав для звільнення працівника за вчинення корупційного або пов'язаного з корупцією правопорушення. *Методи дослідження* визначені з урахуванням поставленої мети, задля чого використано сучасні методи наукового пізнання, а саме порівняльно-правовий та узагальнення. Застосування цих методів дало змогу досягнути всебічності та об'єктивності наукового дослідження, обґрунтованості та узгодженості сформульованих висновків.

Ключові слова: звільнення, корупція, корупційне правопорушення, працівник, дисциплінарне стягнення, підстава.

Theoretical framework

The scientific and theoretical basis for writing the article was the work of scientists in criminology, administrative and labor law. The provisions and conclusions of the article are based on scientific points of view and the norms of the current legislation regulating issues related to the dismissal of a person who has committed a corruption offense.

Nowadays, many scientific works of domestic scientists from different domains of law are devoted to such rather negative phenomenon as corruption, as well as improvement of the legislation on its overcoming. The study of such an important aspect as the normative-legal regulation of the grounds for dismissal of an employee for committing a corruption offense was not neglected. In particular, V. D. Gvozdetsky, M. I. Inshin, G. F. Khokhryakov, S. Koneva, O. I. Kyselova, A. I. Miserii, O. O. Onyshchuk, M. V. Pitsur, K. O. Rusakovska, A. Robertson, V. I. Shcherbyna, V. M. Soloviov, V. Stashys, O. V. Tereshchuk, V. Trepak and other lawyers were engaged in the study of this issue. Specific proposals and recommendations made by the legal community were taken into account by lawmakers making the necessary amendments and additions to the current legislation of Ukraine. At the same time, it is necessary to state that the problem mentioned is still not fully resolved, and therefore requires further systematic research.

Methodology

Methods of the study are determined by the aim stated. For this purpose, methods of scientific knowledge, such as comparative legal and generalization, are used to the achieve comprehensiveness and objectivity of scientific research, validity and consistency of the conclusions formulated. The use of these methods is the basis for a systematic analysis of the scientific literature and the current legislation of Ukraine regarding the dismissal of an employee who has committed a corruption offense. In particular, the comparative legal method, being the basic method of the methodology of comparative law, was used to study the general and special features of such definitions as "corruption", "corruption offense", "corruption-related offense", as well as the regularities of their introduction into the national legislation of Ukraine. The method of generalization was used studying the scientific viewpoints of scholars to understand the concept of "corruption" and the directions of its overcoming.

Results and discussion

Starting the scientific research, it should be noted that the Labor Code of Ukraine defines a substantive list of causes for the dismissal of an employee. These include: parties' agreement; expiration of the employment agreement; the call-in or entry into service of an employee or owner, referral to alternative (non-military) service etc.; termination of an employment agreement at the employee's initiative; transfer of an employee, at his / her consent, to another company, institution, organization or transfer to an elected position; refusal of the employee to transfer to work in another locality with the company; the entry of a judgment into legal force, which an employee is convicted by (except cases when a person is free from serving a probation); conclusion of an employment agreement (contract), contrary to the requirements of the Law of Ukraine «Prevention of Corruption», established for persons who retired or otherwise ceased activities related to the performance of functions of the state or local self-government within one year from the date of its termination; on the causes provided for by the Law of Ukraine «On the Purification of Power»; the causes provided for by the contract; the causes provided for by other laws (The Labor Code of Ukraine, 1971).

So, what exactly is corruption as a social phenomenon? In Roman law, the definition of

«corrumpere» was interpreted as damaging, breaking, destroying, bribing and meant unlawful acts in judicial practice, in particular, obstructing the normal course of the judicial process or the process of managing the affairs of society (Stashys, 2001, p. 163-168). For the first time in the modern sense, the definition of corruption dates back to 1425, when corruption was first described as a «deviation from righteousness and loyalty in the performance of duties» (Robertson, 2006).

Today, there are a lot of approaches in the juridical literature to interpret this concept. Thus, in a directory published by the international organization Transparency International, corruption is also treated as abuse of entrusted power for personal gain and is classified into three types: petty corruption - the daily abuse of power by middle and lower level public officials in their interaction with average citizens trying to access basic services provided by the state in health care facilities, education, police departments at the place of residence and other state institutions; corruption and grand corruption are committed at the central level of public administration, actions that distort the policy or functioning of central government bodies, enabling high-level officials to benefit from the public good; political corruption, manipulation of policies, institutions and regulations (rules, procedures) by officials who take political decisions on the allocation of resources and funding, who use their positions to maintain their powers, status and material state (Soloviov, 2011, p. 175).

G. F. Khokhryakov believe that corruption is the use by individuals authorized to perform state functions (or individuals of equivalent status) of their status and relevant opportunities for receiving wealth and other benefits which are not provided for by law, as well as the unlawful granting of these benefits by individuals and businesses (Khokhryakov, 1999). According to A. I. Mizerii, corruption is a social phenomenon that involves the disintegration of society and the state, when public (municipal) officials, as well as persons empowered to perform both public and other administrative functions, including in the commercial sector, use their official position, status and authority of the position against the interests of the service or other individuals and established norms of law and morality, for selfish purposes for personal enrichment or for group interests. The main feature of this definition is that the changes that have taken place over the last 15-20 years and have forced the author to include the representatives of private sector into

the list of subjects of corrupt practices (Miserii, 2000, p. 94-95).

The definition of corruption proposed by O. V. Tereshchuk is quite successful. The scientist sees corruption as an activity of a person authorized to perform public functions or a person of equivalent status, aimed at the unlawful use of his / her power or his / her position and relevant opportunities for illegal receiving of material goods, services, privileges, services or other material and non-material benefits, as well as the bribery of such persons by individuals and businesses (Tereshchuk, 2000, p. 11).

V. D. Gvozdetskyi notes that corruption is a complex and multidimensional (legal, economic, political, moral and psychological) social phenomenon. The social essence of corruption is that it: has social conditionality (is a product of social life); has a social cost that society pays for corruption, has a significant impact on the most important social processes; has historical origins and global character; is a legal, economic, political, psychological and moral phenomenon; has the property to adapt to social realities, constantly reflect and change. The specific manifestations of this social phenomenon receive legal and moral appreciation from the state and society that also demonstrates the social essence of corruption. Corruption characterizes the main social processes that take place in the state and society, the most significant problems of the state and society are reflected in it (Gvozdetsky, 2012, p. 161).

International and national laws and regulations also contain definitions of corruption. In particular, the resolution «Practical measures against corruption», distributed at the VIII Congress of the United Nations for the Prevention of Crime, defined corruption as «a violation of the ethical (moral), disciplinary, administrative, criminal nature that is reflected in the unlawful use of its official position by the subject of corruption activities» (Resolution of the VIII CUNC, 1999). The Civil Law Convention on Corruption of 4 November 1999 interprets corruption as «the direct or indirect extortion, offering, giving or receiving a bribery or any other illegal benefits or ability to obtain it that violates the proper performance of any duty by a person, who receives a bribe, illegal benefit or opportunity to have such benefit, or the behavior of such a person» (The Civil Law Convention on Corruption, 1999). It is worth noting that the concept of «corruption» has its legislative framework. In particular, according to the Law of Ukraine «The Prevention of

Corruption», corruption is the use by a person of his or her official powers or relevant opportunities in order to obtain an unlawful benefit or accept such benefit or promise / offer of such benefit to himself or others or relevant promise / offer or providing an unlawful benefit to a person specified in the first paragraph of Article 3 of the above-mentioned Law or at his request to other individuals and businesses in order to induce that person to the unlawful use of her duties or relevant opportunities.

Thus, corruption is a negative social phenomenon that prevents the normal development of society, adversely affecting the development of each individual company, institution, and a state as a whole. In the scientific literature, the notion of corruption is increasingly equated with the category of «corruption offense», which in our opinion is somewhat incorrect. This thesis is confirmed by the legislator that determines that a corruption offense is an act that contains elements of corruption committed by a person for which there are criminal, disciplinary and / or civil sanctions. At the same time, the legislator uses the concept «corruption-related offense», which means an act that does not contain elements of corruption, but violates the requirements, prohibitions and restrictions established by this Law by a person referred to in the first paragraph of Article 3 of this Law, for which criminal, administrative, disciplinary and / or civil liability is established by law. Meanwhile, we note that the concept of corruption crime is not defined in the norms of the Criminal Code of Ukraine, but only in the note to Art. 45 of the Criminal Code it is stated that corruption crimes are defined as crimes provided for in Articles 191, 262, 308, 312, 313, 320, 357, 410, in the case of committing them by abusing of the office, as well as the crimes provided for in Articles 210, 354, 364, 364-1, 365-2, 368-369-2 of this Code.

M. V. Pitsur states that a corruption offense should be understood to mean socially dangerous acts committed by an official and in which all elements are related to a corruption and for which there are criminal, administrative, civil or disciplinary sanctions. These offenses can only be committed by officials who are always involved in the abuse of power or official position and which are aimed to receive unlawful benefit with mercenary or any other motives (Pitsur, 2013, p. 62).

There is a widespread view in the literature according to which the legislator considers it necessary to divide all offenses in the field of

corruption prevention into two groups: serious corruption offenses leading to dismissal from public service; other offenses for which penalties may be applied, not related to the termination of public service (Onyshchuk, 2010).

In addition, corruption offenses can be classified into two groups. The first group, the main one, includes a set of offenses, directly defined in the Law of Ukraine "On Prevention of Corruption", administrative and criminal legislation, which as a qualifying feature have the use of official position in order to obtain unlawful benefits from other persons. The second group of offenses (to derivative corruption offenses) contains offenses aimed at concealing illegally obtained money, things and other types of property, including committing actions that hinder the prevention of corruption (Koneva, 2017).

The subject component of a corruption offense is: persons authorized to perform the functions of a state or a local self-government; officials of public law entities; persons providing public services (auditors, notaries, appraisers, as well as experts, insolvency officer, independent mediators, members of labor arbitration, arbitrators during the performance of these functions, other persons fixed by law); persons holding an office related to the performance of organizational, administrative or administrative-economic duties, or specially authorized to perform such duties in private legal entities, as well as other persons who are not officials and who perform the job or provide services in accordance with a contract with a company, institution, organization - in the cases provided for by current legislation (Trepak, 2016, p. 50-57).

It should be taken into consideration, that in accordance with Article 55 of the Criminal Code of Ukraine disqualification from holding particular positions or engage in certain activities as additional punishment may be imposed in cases when it is not provided for in the sanction of the Article of the Special part of this Code, provided that taking into account the nature of the crime committed ex officio or in connection with engaging in certain activities, the court finds the convicted person and other circumstances of the case for the inability to retain the right to occupy particular positions or engage in certain activities.

From the analysis of the Criminal Code of Ukraine, it is clear that certain sanctions of articles for corruption offenses provide for the possibility of imposing two additional

punishments at once: deprivation of the right to occupy particular positions or engage in certain activities and confiscation or fine (for example, Art. 364, 368-2 of the Criminal Code). The deprivation of the right to occupy particular positions consists in the dismissal of the convicted person for the period specified in the court sentence from the position which he occupied at the time of committing the crime, and the deprivation of his right to occupy similar positions in other companies, institutions and organizations.

According to Art. 36 of the Labor Code of Ukraine the administration of the company, institution, organization at the job address of the convicted person in the cases provided for by the items 7 and 7-1 of Part 1 of Art. 36, is obliged to dismiss him within three days from the day of receiving by the state authority, local self-government body, company, institution, organization of a copy of the relevant court decision, which has entered into force, and in the case provided for in paragraph 7-2, the person shall be dismissed from the position in the manner specified by the Law of Ukraine «On the Purification of Power». At registration of dismissal of an employee who committed a corruption offense the relevant Article 36, section 7-1, of the Labor Code will be indicated as the case for dismissal in the employment records. A similar term is limited now for termination of labor contract with the entry into force of a court sentence by which an employee is sentenced to imprisonment (except cases of exemption from probation) or to other punishment that makes it impossible to continue to do so. In this case, the term also extends to non-corruption offenses.

In addition, the amendments to Article 41 of the Labor Code of Ukraine also provide for an extension of the range of additional causes for termination of a labor contract at the initiative of the owner or a body authorized by him with certain categories of employees. A new reason for such termination is a being of an employee under the supervision, contrary to the requirements of the Law «On Principles of Prevention and Combating Corruption», to a close person, if it is not possible to transferred him to another job by agreement (previously such dismissal was provided only by the Law, but not by the Labor Code).

It cannot be said that the existence of norms of dismissal of employees for committing corruption offenses in several acts is incorrect. The existence of such provisions in the Labor

Code and the Law «On Principles of Prevention and Combating Corruption» do not lead to conflicts and do not contradict each other, but rather complement each other and are correlated as general and special norms. The provisions of the Labor Code just provide for the punishment for committing a corruption offense as a ground for dismissal, while the relevant provisions of the Law detail the relevant dismissal procedure.

It is important to draw the attention that a person can be dismissed under Art. 36-7 of the Labor Code only if he was sentenced about the prosecution for committing a corruption offense or he was determined an administrative liability. During the proceedings in the case of bringing a person to justice for committing a corruption offense, from the moment when the person was informed that he or she is suspected of committing a corruption offense until the final decision, the person should be suspended. Another thing to note is that a person is obligatory suspended in the case of criminal prosecution of bringing a person to justice for committing a corruption offense. If a person is suspected of committing a corruption offense for which he or she may be prosecuted to an administrative liability, then such person may be suspended.

As noted in the legal literature, the order of bringing to disciplinary liability for a corruption offense can be roughly divided into categories of employees. 1. Early termination of powers of an elected official, termination of powers of an official, dismissal carried out by decision of the President of Ukraine, Verkhovna Rada of Ukraine, the Cabinet of Ministers of Ukraine, dismissal of a military official from military service in connection with bringing to justice for the corruption offense, as well as the suspension of such person from the official powers in the cases provided for in paragraph 1 of this Article, shall be carried out taking into account the particularities determined by the Constitution and laws of Ukraine. 2. Other persons who are brought to criminal or administrative liability for corruption offenses related to violations of the restrictions provided for by this Law shall be dismissed from their posts within three days from the date of receiving by the state authority, local government, company, institution, organization a copy of the relevant judgment, which has entered into force, unless otherwise provided by law (Rusakovska, 2014; Inshin, Shcherbyna, 2014).

It should be emphasized that the termination of a person who has committed a corruption offense should be quite legitimate. At present, the science

of labor law determines that the termination of an employment contract is legitimate under the simultaneous presence of the following conditions: 1) the grounds for termination of the employment contract provided by law; 2) compliance with the termination order; 3) the legal fact for termination of the employment contract, for example, the employer's order or instruction, the employee's statement, etc. (Kyselova, 2018).

Conclusions

Thus, summarizing all of the above material, it should be stated that a corruption offense should be understood as the guilty unlawful behavior of an authorized person, which contains elements of corruption, that is: first, it includes the obtaining of unlawful profit (in the form of monetary or other remuneration), because of the use of the powers; secondly, it negatively affects the functioning of the company, organization, institution etc., causing its economic, political or image damage etc.; thirdly, it discredits the employee (who committed the offense), as well as the relevant state body, or institution in the public eye.

The commission of a corruption offense by an authorized person, in addition to other types of legal liability, must necessarily provide some disciplinary sanction in the form of dismissal from the present position, no matter what the unlawful benefit she received from it. This is due to the fact that: a) the employee who committed the offense, a priori, loses employer's confidence, which hinders the further promotion of effective labor relations between them; b) secondly, it damages the image of the institution and organization from clients (if it is a company or organization), as well as from citizens, if it is a public authority. Therefore, we consider it a person shall be dismissed in the case of a corruption offense no matter what damage, financial and / or image, was caused to the employer as a result of his unlawful act.

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