

LAGUTINA I. V.

National University «Odesa Law Academy»,
Head of the Department of Labour Law and Social Security Law,
Doctor of Law, Professor

PROTECTION OF LABOUR RIGHTS IN THE PRACTICE OF THE EUROPEAN COURT OF HUMAN RIGHTS

Key words: *European Court of Human Rights, labour rights, eComms, employee, Online Platform.*

The case law of the European Court of Human Rights demonstrates the growing importance of labour rights.

The European Court of Human Rights has become a unique international body of justice, whose purpose is to increase the legal protection of the individual and the extension of the rights of the individual. For the first time an individual was granted the right to sue the state for the restoration of the violated right by filing an appeal to an international court. Recognizing the jurisdiction of the European Court in the system of an international mechanism for the protection of human rights, the state proceeds from the priority of international law over national law.

At least a violation of the three articles of the Convention for the Protection of Human Rights and Fundamental Freedoms can be a reason for applying to the European Court of Human Rights: article 4 (Prohibition of slavery and forced labour), article 8 (Right to respect for private and family life), article 11 (Freedom of assembly and association).

The list of possible violations of the Convention that may be subject to review by the European Court of Human Rights is not exhaustive. Other violations may also be grounds for appeal to the specified court in order to protect the violated rights in the field of labour relations.

Turning to the practice of the European Court in the field of discrimination, it is worth highlighting that the actual disputes about discrimination in labor or social security relations are rare. Art. 14 of the European Convention prohibits discrimination, but applies only to the rights listed in the convention itself.

The court defines discrimination as a different appeal to people who are in the same situations without objective and reasonable justification. In addition, in the decision on the case of Thlimmenos v. Greece [1]. The court found that the refusal of the state «to treat persons whose situations differ significantly» is also considered to be discrimination. The difference in treatment, as the first criterion of discrimination, is revealed by the Court by comparing it with the position of others in a similar situation. For such a comparison, an important factor is to establish the similarity of situations in which the compared persons are located. The rule of distribution of the burden of proof in discrimination cases is one of the important provisions in the practice of the European Court, which ensures the greatest effectiveness

in handling such cases. According to the case law of the ECtHR, in the event that the applicant has proved the difference in the appeal, the respondent State must prove that this difference was justified and does not constitute discrimination⁶.

The practice of dealing with cases of indirect discrimination in the practice of the ECHR should be particularly interesting for lawyers, since this category is absent in jurisprudence. According to the interpretation of the International Labour Organisation, the Convention No. 111 on discrimination in the field of labour and occupation applies to both direct and indirect discrimination. Thus, it is theoretically possible to claim judicial protection against indirect discrimination on the basis of the provisions of the ILO Convention No. 111, appealing to the legal positions of the ECHR. It is obvious that the European Convention does not contain rules on the procedure or grounds for termination of an employment contract. At the same time, the European Court in some cases recognized the dismissal of employees as contrary to the Convention, relying on the norms of art. 8 on the protection of private and family life (*Obst v. Germany* [2], *Lustig-Prean and Beckett v. United Kingdom* [3]), Art. 9 on religious freedom (*Eweida and Others v. The United Kingdom* [4]), Art. 10 on freedom of thought (*Vogt v. Germany* [5]), Art. 11 on freedom of assembly (*Palomo Sánchez a.o. v. Spain* [6]), often in conjunction with Art. 14 on the prohibition of discrimination.

After a long (from 2016) testing on individual users of the electronic document exchange system, the European Court of Human Rights finally opened it to all applicants. What is the new eComms service? eComms (ECHR Electronic Communication Service) is a service implemented by the ECHR for electronic communication with representatives of applicants. It is activated only after communication (that is, acceptance) of the complaint, when it goes to the production stage and the respondent government must provide comments [7].

The essence and convenience of the system is that person can submit (upload) procedural documents from it: denial, requirements, other documents, without sending correspondence in paper form.

Undoubtedly, the key advantage in this is saving time on sending and receiving documentation with instant confirmation of receipt.

Now all the courts of Ukraine are actively implementing the so-called «Electronic Court» project in their work in order to simplify citizens' access to information about the progress of the case in court, the exchange of documents between the participants in the case and the court.

It is important to underline that more than half of all applications filed with the Court since its inception concerning violations of Article 6 of the Convention, which deals with a fair trial within a reasonable time. 58% of the violations found by the Court concern or Article 6 (right to a fair trial), or Article 1 of Protocol No1 (protection of property rights).

The uniqueness of this mechanism is due to the fact that, in contrast to legal systems with classical case law, the European system of human rights protection is constantly adapting to novelties in public relations. The Convention, as repeatedly noted in ECtHR decisions, is a living mechanism,

constantly evolving, which constantly has to overcome the tension between legal certainty, consistency of interpretation and new circumstances.

For instance, European Court limits employers' right to monitor employees' email. The European Court of Human Rights ruled that companies can monitor their employees' email if they are notified in advance, giving shape to a rapidly evolving area of the law at the intersection of technology, privacy and employees' rights.

In doing so, judges are scaling back a previous ruling that had stirred unease in Europe, where privacy is viewed as a fundamental right. That earlier decision had taken a similar approach to existing law in the United States, which gives companies wide-ranging powers to monitor workplace communications.

The latest decision, by the Grand Chamber of the European Court of Human Rights, provides more protection by requiring companies to inform workers of their policies. Judges also urged European governments to establish safeguards against abuse, and said that businesses should consider using forms of monitoring that avoid infringing on an employee's privacy [8].

It is important to evaluate that national legal systems and the European system of human rights protection should cover legal regulation of such a category of employees as employees in the online platform economy.

Online platforms position themselves as intermediaries that match demand and supply of labour, putting in contact workers and clients. Clients – whether physical persons or companies – can post tasks, while workers can find those tasks that correspond best to their skills and their availability for doing work. As there are no boundaries in the online world, online platforms allow clients to reach out to a global workforce.

From a regulatory perspective, platform labour represents a «moving target» [9]. Another noteworthy fact in this context is that Ukraine ranks first in the world in «IT freelance». It is estimated that at least 3% of the Ukrainian workforce is involved in online work.

Online work is available to Ukrainian workers through over forty different platforms.

It should be noted that the key challenge associated with online work is that workers executing tasks through such platforms are treated as «freelancers», or «independent contractors», in other words, as self-employed persons providing services or goods. Thus, the vast majority of workers do not fall into the scope of the labour and social security law. Moreover, platform workers providing digital (online) work are firstly exposed to all the known hazards related to work with computers, such as visual fatigue and musculoskeletal problems. Again, as is the case with physical work, these risks are elevated for online platform workers, especially because of the time pressure under which they tend to work. The fact that the work is carried out independently at home, making use of the workers' own equipment, may furthermore mean that this equipment does not meet ergonomic criteria, that the seating and work surfaces do not guarantee correct posture and that other environmental factors are not optimised for working (lighting, temperature, humidity, air quality, etc.) [10]. Finally, other potential risks

include technostress, technology addiction, information overload, burn-out, permanent exposure to electromagnetic fields, postural disorders and cyber-bullying [11].

Clearly, there is scope for an explicit governmental policy to fully unleash the potential from digital work for the Ukrainian society, and also to make it sustainable. Such policy can first and foremost aim at facilitating the formalization of the activity of Ukrainian online workers, and legalizing their incomes from the platforms, in line with the ILO Transition from the Informal to the Formal Economy Recommendation, 2015 (No. 204).

Thus, the legal regulation of the peculiarities of the regulation of the work of digital employees, platform employees in the draft Labour Code of Ukraine is necessary in order to ensure observance, promotion and implementation of the fundamental principles and rights in the field of labour, as well as personal non-property rights and property rights of employees.

References:

1. ECtHR, *Thlimmenos v. Greece* [GC] (No. 34369/97), 6 April 2000, para. 44, а также, ECtHR, *Pretty v. UK* (No. 2346/02), 29 April 2002, para. 88.
2. ECtHR, *Obst v. Germany* (no. 425/03), 23 September 2010.
3. ECtHR, *Lustig-Prean and Beckett v. The United Kingdom* (31417/96;32377/96)27 September 1999.
4. ECtHR, *Eweida and Others v. the United Kingdom* (N 48420/10)15.1.2013.
5. ECtHR, *Vogt v. Germany* (17851/91)26.09.1995
6. *Paloma Sancez and others v. Spain* (28955/06.)12/09/2011.
7. ЄСПЛ йде в онлайн: що треба знати про новий сервіс eComms (2019). Режим доступу: <https://court.gov.ua/press/interview/651324/>
8. European Court Limits Employers' Right to Monitor Workers' Email (2017). *The New York Times*. Retrieved from <https://www.nytimes.com/2017/09/05/business/european-court-employers-workers-email.html>
9. Garben S. (2017), Protecting Workers in the Online Platform Economy: An overview of regulatory and policy developments in the EU, European Risk Observatory Discussion paper, p. 14.
10. Huws U., 'A review on the future of work: Online labour exchanges, or "crowdsourcing": Implications for occupational health and safety', EU OSHA discussion paper.
11. Valenduc G. and Vendramin P., 'Work in the digital economy: Sorting the old from the new', ETUI Working Paper 3 (2016), p. 36.