

Revisiting the Question of Legal Regulation of the Concept of "Vacancy"

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ABSTRACT

A vacancy is the subject of the formation of supply and demand dynamics at the labor market. However, this legal phenomenon is not properly reflected in the legislation. In practice this fact gives rise to many violations of the rights of citizens in employment. In this regard, in this paper, the author states that it is necessary to propose to fix both the definition of a vacancy and the requirements for its formation. Thus, a vacant position (job) should be understood as a free, permanently or temporarily labor function in the structure of some type of economic activity of an employer, formed into a group of labor actions corresponding to it and announced for its filling. A vacancy announcement is a special kind of employer's obligation, similar to a private offer. Such an announcement must contain all the conditions of the future agreement, and if it is an employment contract, then it must contain all its intended conditions to the extent also arising from the local regulations of an employer. If there is insufficient information to conclude an employment contract, an employer who announced the employment should be obliged to provide a person who applied to him with the necessary information and a reasonable time to think it over; to fix monetary compensation in the law for cases of unlawful refusal to provide such information. In all cases when guarantees to offer employees a vacant job are established, only the vacancy where employee's expected income will be greater than the severance pay should be considered eligible for announcement. It seems that these proposals will have a qualitative positive impact on the procedure for reducing the number or staff of employees, unify the requirements of labor and employment legislation and harmonize them with each other.

Keywords: *vacancy, employment, labor market, guarantees*

1. INTRODUCTION

Russian labor legislation and legislation on employment in the Russian Federation actively use the term "vacancy". At the same time, the Labor Code of the Russian Federation (Labor Code of the Russian Federation of December 30, 2001 No. 197-FL // Collected Acts of the Russian Federation. - 2002. - No. 1 (Part 1), - Article 3; hereinafter referred to as the Labor Code of the Russian Federation) also uses synonymous concepts of "vacant position" and "vacant job", however, without formulating any legal definitions or legally significant signs.

The law of the Russian Federation of 19.04.1991 No. 1032-1 "On employment in the Russian Federation" (Report of Congress of Peoples' Deputies and the Supreme Council of the RSFSR, 1991, No. 18, Article 565) also operates with the concept of "free workplace", which, according to the context of Article 16.1 of the law, is not identical with the term "vacant position" (subparagraph 4 of paragraph 3 of this article) and, apparently, means either work of low qualifications (when an employee cannot be classified as officials with inherent characteristics), or urgent work necessary for an employer without the formation of a permanent staffing unit.

The use of the legal category "vacancy" in Russian labor law is of great importance. Thus, the offer of a vacant job forms the employment relationship with the given employer (Articles 1, 64 of the Labor Code of the Russian Federation). Such a proposal is one of the frequently applied labor law guarantees to employees the labor relations with whom change or terminate due to circumstances that do not depend on their behavior (Articles 73, 74, 81, 83, 180, 261 of the Labor Code of the Russian Federation). Vacancy is a system-forming condition for determining the nature and timing of the transfer, the adoption of local norms on the possible career growth of an employee.

From the point of analysis of the structure of labor market as a socio-economic system and a legal model, a vacancy is the subject of the formation of market dynamics of supply and demand.

Since the prohibition of forced labor has been proclaimed as a fundamental principle of international labor law, which, unfortunately, is not always understood and implemented in the same way by individual states [1, p. 108], in labor market, in order to avoid violation of fundamental human rights in the world of work, the circulation of labor cannot be legalized, but the method and limits of its use can be.

Therefore, modern legislation should pay due attention to the description (regulation) of the concept and content of a vacancy (vacant job).

In the science of labor law, the issues of legal regulation of vacant jobs are not properly studied. The basis of the legal perception of this phenomenon is formed by law enforcement practice. According to the generalized idea of certain number of publications on this topic, it follows that in commonly accepted meaning, a vacant position (job) is a free, permanently or temporarily labor function in the structure of any type of economic activity of an employer, formed into a group of labor actions corresponding to it and announced to fill it.

For example, L.A. Chikanova, in context of labor relations, defines a vacancy as a position provided by the organization's staffing table, which is free, i.e. not filled (not occupied) by any specific employee (including a part-time employee) who is in an employment relationship with this organization [2, p. 44]. E.P. Efremova notes that, in contrast to a position filled (occupied) by an employee, a vacant position corresponds to the claim of a candidate expressing his will only to receive it [3, p. 58].

In fact, the requirements for the amount of information that make up the description of a vacancy, as well as for the preparation of employer's proposal to search for an employee for a vacant position (job), are not directly and in detail regulated by law and have not received a proper analysis in scientific literature. It is necessary to agree with A.V. Syntin that "the Labor Code of the Russian Federation describes in sufficient detail the procedure for hiring, but does not contain provisions on the legal nature of announcements of vacancies as well as on the procedure formation of vacancies" [4, p. 92].

These circumstances are the main reason for the violation of the rights of a significant number of citizens who apply to potential employers for employment. As a result, O.V. Borisov and O.A. Snezhko note that the real practice is still far from the requirements of the law. This can be proved by the content of job advertisements published in the media, including special publications devoted to job search: the requirements for those wishing to apply for a job are set according to gender, age, place of residence, presence of registration in a given locality and other discriminatory grounds [5, p. 45].

The above mentioned aspects are still relevant at the present time. In this regard, the purpose of this paper is to form the concept of a vacancy (vacant job) in employment relations, develop requirements for the amount of information that makes up a job description and their registration for potential candidates for a job (position).

2. MATERIALS AND METHODS

In order to achieve this purpose, general scientific (dialectical, systemic) and special research methods were used: legal-dogmatic, comparative-legal and other methods of cognition of legal phenomena. The methodological basis of the study was presented by a

positive and critical analysis of regulatory information and scientific literature.

3. RESULTS

After the study of the available regulatory and scientific sources of information on the research topic, the author comes to the following.

Labor Code of the Russian Federation in Article 64 establishes the ban on unjustified refusal to hire. The Labor Code of the Russian Federation does not use the term "illegal". Thus, it can be stated that the legislator does not offer any standard list of business qualities of an applicant for a particular job and avoided deciding whether the personality traits of an applicant for a job are sufficient grounds for refusing employment which is not mentioned anywhere in regulatory legal acts. For example, his appearance, photogenicity, speech defects, timbre and loudness of the voice, phenotype, low resistance to cold, the degree of sociability, etc.

At the same time, an employer, as indicated in clause 10 of the Resolution of the Plenum of the Supreme Court of the Russian Federation of March 17, 2004 No. 2 "On the application of the Labor Code of the Russian Federation by the courts of the Russian Federation" (Bulletin of the Supreme Court of the Russian Federation, 2004, No. 6) for the purpose of effective economic activity and rational property management independently, under its own responsibility, makes the necessary personnel decisions (selection, placement, dismissal of personnel) and the conclusion of an employment contract with a person looking for a job; and this is a right, not an obligation of an employer. The Labor Code of the Russian Federation does not contain norms obliging an employer to fill vacant positions or jobs immediately as they occur.

Due to the above mentioned aspects, a court at the level of precedent can make a decision on a dispute on refusal to hire, based on the absence of regulatory norms that allow considering the business qualities developed by an employer as the basis for refusal of employment. Or, vice versa a court can make a decision on the local regulatory act of an employer or on the opinion of a specialist (for example, in the field of job specification). The only question here is whether a court will see an abuse of the right in the employer's actions or not, and in the interpretation of the exclusiveness of the requirements according to Article 57, 65 and 69 of the Labor Code of the Russian Federation.

However, the degree of intervention of the federal legislator in the regulation of requirements for the professional qualities of employees is qualitatively different in the sphere of the operation of professional standards, especially those, the compliance with which is obligatory according to the third paragraph of the second part of Article 57 of the Labor Code of the Russian Federation. Currently, the professional standards determine the requirements for the qualifications necessary for an employee to perform a certain job function. The characteristics of qualifications that are contained in those

professional standards, the mandatory application of which will not be established, should be used by employers as a basis for determining the requirements for the qualifications of employees, taking into account the peculiarities of the job functions performed by employees, due to the technologies used and the adopted organization of production and labor.

From the standpoint of most professional standards the basis of professional qualities was professional education and, in some cases, work experience in a specialty (profession, position).

Consequently, an employer is only partly free to decide hiring issues, since mandatory professional standards, as a rule, accompany all activities that pose the increased danger or significance to society and the state.

Nevertheless, in employment policy of an employer there is quite a lot of legal space for making independent managerial decisions. For example, an employer has the right to declare the competitive nature of filling a vacancy [6]. He also has the right to invite a specific citizen to work (the Labor Code of the Russian Federation names one such case directly and connects it with the transfer of an employee from another employer).

Meanwhile, if an employer public announce vacant jobs and officially indicates his intention to hire workers, the Supreme Court of the Russian Federation proposes, in the event of a dispute over the refusal to hire a candidate for employment, to check exactly how an employer proposed available jobs (for example, a message about vacancies was sent to the employment services, published in a newspaper, announced on the radio, announced during speeches to graduates of educational institutions, etc). In addition the Supreme Court of the Russian Federation proposes to find out if there were any negotiations about employment with this person and what were the reasons of the refusal to conclude an employment contract with him.

This type of principle of the obligation of a person who made the pre-contractual offer is characteristic of a public offer in the civil legislation of many countries, which will be discussed below. In this regard, and in the course of time, the interpretation of Article 64 of the Labor Code of the Russian Federation, given by the Supreme Court of the Russian Federation, is proposed to be modernized and be indicated in Article 64 of the Labor Code of the Russian Federation, that an employer is prohibited from refusing to hire a vacant position (vacant workplace) to a person who approached him on the basis of a proposal of an employer to fill this position (workplace) and meets all the applicable and legally established requirements, provided that an employer did not invite a specific person to work and if it is not proven that an employer did not intend to enter into an employment relationship.

For the purposes of the Law of the Russian Federation of 19.04.1991 No. 1032-1 "On the employment of population in the Russian Federation", a vacancy can be defined as follows: it is a job that is free for replacement and is necessary for an employer in the process of his (life) activity or work that an employer offers to individuals on conditions determined by them in compliance with the requirements of the law.

Therefore, a job offer must contain at least the form of work and the type of contract corresponding to it (civil law, service or labor contract). During the choice of a model of an employment contract, the content of a vacancy must contain the conditions of the agreement (at least mandatory ones according to part 2 of Article 57 of the Labor Code of the Russian Federation), associated, in its turn, with local regulations of a particular employer known to an applicant for a vacancy.

According to the procedure of employment contract, the proposal for its conclusion must contain a clause that this is either a basic hiring model, or a test condition, or competitive selection. The information about a person who created the vacancy is also required - at least to the extent specified in Article 57 of the Labor Code of the Russian Federation.

At the same time, as suggested by A.V. Lykasov [7], we would not include the information characterizing the geography of employer's activities, the number and composition of its employees, as well as the presence, features, content of the rules of corporate ethics, corporate values and principles (if an employer has any), in the content of a vacancy.

On the contrary, we agree with the opinion of A.V. Krotov that the primary stage of the relationship between an employee and an employer begins from the moment when an employee receives information from an employer, in which an employer informs an employee about the list of working conditions (further the author specifies the conditions which according to her opinion must be included in employment contract) [8]. This very list and the specific content of these conditions in the case of a dispute over the conclusion of an employment contract (Article 16 of the Labor Code of the Russian Federation) will be determined by the court.

4. DISCUSSION

The announcement of a vacancy containing the above mentioned conditions and information, with the attachment of copies of existing local regulations of an employer on the issues indicated among the obligatory conditions of employment contract, has some features similar to the offer for concluding a civil contract. In case of insufficient information and conditions describing the content of a vacancy, by analogy with civil law, we can talk about the invitation of an employer to make offers to conclude an employment contract from the part of persons seeking for a job in the relevant position or specialty (profession).

In this case, it would be better to differentiate the opinion of the Supreme Court of the Russian Federation, cited above, for cases of sufficient and insufficient information on working conditions to conclude an agreement. For example, in case of insufficient information for the conclusion of an employment contract, it is necessary to oblige an employer who advertised employment to provide a person who applied to him to clarify the conditions of a vacancy with the necessary information and (which is

currently not included in the legislation) a reasonable time for its study and reflection. By analogy with a period of 2 working days reflected in Article 193 of the Labor Code of the Russian Federation and intended for an employee to prepare explanations in case of possible disciplinary action and to seek qualified legal assistance on this issue, we would suggest the same period, which is in our opinion reasonable to clarify the conditions of a vacancy.

Accordingly, from the moment of the application to clarify the conditions of the announced vacancy until the refusal of a specific applicant, an employer must be prohibited from withdrawing the offer without the necessary compensation. We propose to determine the amount of such compensation in an amount equal to payments in case of reduction according to Article 178 of the Labor Code of the Russian Federation (by analogy with compensation for losses in civil law, since a hired person can be immediately reduced as unnecessary).

In general, despite the categorical nature of the science of Russian labor law on the issue of the impossibility of classifying an employment contract as a private law transaction due to the differences in the branches of civil and labor legislation at the level of principles and presumptions, certain justified analogies are quite possible. Moreover, they actually exist. As F. Pollock correctly noted, every agreement and promise that is enforceable according to the law is a transaction (contract) [9, p. 79].

A huge number of scientific works in domestic and foreign literature are devoted to the issues of the legal essence of an offer as the stage of concluding an agreement and the form of expression of the will of an offerer [10–15]. If an offer is not addressed to a specific person and due to the signs specified in the law is public, that is, it gives the right to accept it to any legally capable acceptor, then, as N.D. Egorov states “the first who responds to a public offer, accepts it and thereby withdraws an offer” [11, p. 445].

This rule should be duplicated for the procedure of the conclusion of an employment contract.

In addition, the legal consolidation of the principle of protecting the weak side from the imposition of clearly exacting terms of a contract at its conclusion, which is characteristic of a number of civil law relations (for example, for consumers) is required in labor legislation, during the formation of the requirements for information about a vacancy [16]. In particular, this should be applied to the conditions of Part 4 of Article 57 of the Labor Code of the Russian Federation on testing when recruiting without formulating clear goals and objectives of testing or compensating an employer for his costs of training an employee, indicating an unreasonable period for working out the cost of training (for example, when the validity of a document that was issued as a result of training has expired and the term of compensation for its receipt is ongoing).

It is necessary to pay due attention to the law enforcement, including judicial practice, of the issue of attributing the situation when an employee is temporarily absent for valid reasons, while retaining rights to this place (position), to

the number of vacant (or, on the contrary, non-vacant) jobs (positions).

For example, it includes the parental leave for a child under the age of three years or temporary transfer for up to one year to another position (job) with the same employer. For example O.V. Motsnaya rightfully distinguishes between vacant and temporarily vacant positions and focuses on the difference in the legal consequences of the circumstances of the termination of work by a person previously hired for this position [17, p. 146-147].

In such a situation, we are dealing with one of the cases of manifestation of the preemptive right of an employee, formally enshrined only in Article 179 of the Labor Code of the Russian Federation for cases of reduction in the number or staff of employees, but manifested in a significantly larger number of provisions of labor legislation.

Although V.A. Belov believes that “preemptive rights are relative subjective civil rights that exist only together with a set of absolute rights, the violation of which entails the victim's right to demand the transfer of rights and obligations arising from such violation to himself in court” [18, p. 51], and similar labor rights of workers due to their lack of a number of features should be considered as “advantages” [18, p. 46, 48]. It is impossible to agree with this point of view. The preemptive rights of labor and civil law are of a general nature, based on the presumption of good faith and on complicity in corporate privileges beyond the prescription of corporate membership.

On the contrary, civil law structures and the identical norms on an employment contract in terms of preemptive rights must be unified (as it is already mentioned above about the offer and emphasis model). Accordingly, if an employee has already been hired and has in this regard the rights regarding its employment at any time after the disappearance of the objective obstacles to perform work (pregnancy, illness, military service, other state duties, etc.), his temporary absence should not form a vacancy under the conditions of an indefinite term of a contract. If an employee is hired under the conditions of an indefinite term of a contract, it is necessary to assume the advantage of the previously accepted person during the reduction of staff.

Despite the above mentioned facts, there is no reason to believe that a vacancy can be formed only under the conditions of an indefinite term of a future contract. Firstly, there are no corresponding legal restrictions. Secondly, there are objective reasons for this. For example, only urgent vacancies can exist until a different decision is made on the legal state of employing company in an organization created for a predetermined period or created to achieve a predetermined purpose. Therefore, it seems that, in order to avoid further disputes, the legislator should establish the rule that a workplace or work in a position when an employee temporarily absent on a legal basis, who has the right to start his duties at any time, is a vacancy. However, it should not always be associated with employees for whom guarantees to offer them vacant work upon dismissal are enshrined in the Labor Code of the Russian Federation.

It is necessary to note that a vacancy which should be offered to an employee who is forced to leave a employer is a job that is more profitable than the compensation to an employee in connection with the termination of employment.

5. CONCLUSION

In addition to the above mentioned intermediate conclusions and proposals based on them, the author summarizes the following.

A vacancy (from the Latin *vacans* "unoccupied") is a free workplace or job in a certain labor function (specialty / profession, position) in the structure of any type of economic activity of an employer, proposed (offered) by an employer on terms of conclusion of a labor contract with a candidate. A vacant position is a permanent or temporary vacant job function in the structure of any type of economic activity of an employer, formed into a group of corresponding labor actions and announced for its filling. The concept of a vacant position is narrower than the concept of a vacancy.

If we assume that an employer can make a managerial decision regarding this type of work on the form of employment (not only in terms of an employment contract), then a vacancy in the intersectoral aspect is a job function that is free to fill and necessary for an employer in the process of his (life) activity, or job that an employer offers to a person under the conditions determined by him in compliance with the requirements of the law.

The general rule of vacancy announcement is an indefinite term of the future contract, if it is a labor one. An urgent vacancy is one provided by law for the conclusion of a fixed-term employment contract in all cases.

However, in the procedure of staff reduction of an organization (individual entrepreneur), where it is currently expected to offer all suitable vacancies to a employee being reduced, a rule should be established that restricts the turnover of temporary (urgent) vacancies and prohibits the transfer of an employee to such a vacant job (position) of an urgent nature, the remuneration for which as a result of the transfer will be less than those established by Article 178 of the Labor Code of the Russian Federation of guarantee payments in case of reduction for this employee. Immediately, employers can be allowed not to offer such vacancies due to the inexpediency of this proposal in the system of guarantees of the rights of workers.

A similar rule should also be established for all cases for which the Labor Code of the Russian Federation gives guarantees of offering employees a vacant job upon the termination of labor relations with them, when an employee has, as an alternative to transferring to a short-term vacancy, severance payments that are more significant than the estimated income in connection with the transfer.

As a result, in law enforcement practice (the law does not specify this case) there should be no obstacles in the transfer of an employee who was previously hired under

the conditions of an indefinite term of employment to an urgent vacancy in case of his consent and subject to the previously described principle of protecting the weak side from being imposed exacting terms of contract.

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