Non-typical forms of employment in the context of sustainable development of the Russian economy

Svetlana Rybak

Abstract. The author has chosen the problem of differentiation of civil law and labour contract and the peculiarities of their application in practice in conditions of atypical employment of a certain part of the population as the object of research. The problem considered by the author acquires a completely new understanding in the light of the development of market relations and the emergence of atypical forms of employment. The objective of the study is to identify controversial provisions in the distinction between civil law and labour contracts in the context of the development of atypical forms of employment in Russia. The article is based on such methods of scientific research as comparative-legal, system analysis, formal-legal, and statistical. Distinguishing between civil law and labour contracts, the author draws attention to the fact that the inclusion in the Labour Code of the Russian Federation of norms regulating the work of the self-employed, who have formalized relations with the client under a civil law contract, may violate the unity of labour law, which, although it establishes the specifics of regulating the work of certain categories of workers, but in general applies to absolutely all employees under employment contracts. It seems that the status of the self-employed needs a more thorough legislative elaboration, which will allow, firstly, to increase the level of social protection of this category of citizens, and, secondly, to create conditions for further reduction of the level of informal employment in Russia. The author states that the legal status of the self-employed is poorly developed, which currently gives rise to a huge number of questions in practice. Analysis of court practice clearly demonstrates the fact that Russian courts still do not have a unified approach to resolving disputes on the reclassification of civil-law relations into labour relations.

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characterized by the strictness of the form of registration of labour relations constituting its subject matter, as well as by a different property of relations between their parties, in which the prevailing character is of a power-subordinate nature, offset by the presence of the weaker party—the employee—of a legally envisaged broad system of social and labour rights.

Scientific and technological progress is not standing still, and its achievements have become the starting point for the emergence of completely new, atypical forms of activity, such as, in particular, platform employment, freelancing, outsourcing and many others. And in recent years in Russia, following foreign practice, the institute of self-employment has been actively developing, the legal uncertainty of which is still the object of study of legal scholars. These types of activities due to their novelty, in the author's opinion, need careful legislative regulation, since the number of people involved in these areas is increasing every year, and therefore the need to provide them with the most decent and safe working conditions increases. However, the answer to the question of what legal branch they should be regulated by, as the author emphasises, is still not formed, which gives relevance to the problem under study.

The objective of the study is to identify controversial provisions in the distinction between civil law and labour contract in the context of the development of atypical forms of employment in Russia and to develop recommendations aimed at eliminating the identified shortcomings.

2 Methods

The research is based on the method of system analysis. In addition to this method, in order to conduct a more systematic study of the designated topic, the author also used formal-legal, comparative-legal, statistical and concrete-sociological methods.

3 Results

The analysis of the legal nature of a civil law contract and a labour contract enables us to establish the key differences between them. The first and most significant criterion of differentiation is the difference in the subjects of both contracts [2]. In particular, if the labour contract is aimed at direct regulation of labour activity, regulating the procedure for its implementation, in the case of civil law contracts the results of the performance of the obligation—the results of the work performed or services rendered—defined by the agreement of the parties come to the fore. As I.K. Dmitrieva rightly emphasized, "the performer of a civil law contract performs not a labour function, but the obligation of the contract" [3].

The Supreme Court of the Russian Federation in its acts repeatedly emphasised the need for courts to delve into the nature of disputed legal relations [4]. In particular, the Supreme Court of the Russian Federation has repeatedly sided with the plaintiff, recognizing his arguments valid and recalling that in resolving such issues irremovable doubts are interpreted in favour of recognizing the parties' relations as employment [5], [6].

The next criterion consists in the difference of organisational and managerial features of both types of labour activity. Thus, based on the provisions of Art. 15 and 56 of the Labour Code of the Russian Federation and the Resolution of the Plenum of the Supreme Court of the Russian Federation of 29.05.2018 No. 15 [7], attention should be paid to the main organizational characteristics of employment relations: 1) the work is performed under the control and in accordance with the instructions of the employer; 2) to perform the work, the employee is included in the employer's organisational structure, becomes a full-time employee.
employee, is obliged to comply with the local norms in force at this employer; 3) the work is performed by the employee personally; 4) the work activity is performed in accordance with a certain schedule and at the workplace, its maximum duration is set, the employer keeps a record of working time; 5) the work is of a permanent nature; 6) for the performance of labour duties the employee is systematically paid a wage not lower than the minimum wage established by law; 7) the employer provides the labour activity by providing materials, equipment, tools, etc.

If we attempt to apply these characteristics to any contract of a civil law nature, we can observe a clear discrepancy between them. Firstly, for the customer is important only the final result of work or service, so he does not have the right to direct the performer as his own employee, except for a few opportunities to control the execution of the contract, but in comparison with labour relations, they are very limited. The opposite also applies to the contractor, since within the framework of the contract he is independent and can act as he sees fit, independently forming his own work schedule. It should not be forgotten that, as a general rule, work or services under a civil law contract are performed using tools and materials belonging to the contractor.

Secondly, as a general rule, delegation of powers to the performer of work/service is permissible in most civil law contracts, unless the parties' agreement expressly prohibits it (however, there are exceptions - for example, delegation of powers to the author of a work is not permissible under a contract of authorship).

Thirdly, a civil law contract does not imply the permanent nature of the legal relations of the parties, but is aimed at the performance of a one-off or periodic, specifically defined work or service, after which the parties' relations are terminated. Moreover, labour legislation establishes a clear list of grounds for concluding a fixed-term employment contract, prohibiting its arbitrary execution, while the parties to a civil law contract are entitled to determine the duration of the agreement independently and without the need to motivate their opinions.

Fourthly, there is a significant difference in the mechanism of labour remuneration under a civil law contract. For the fulfilment of obligations under a civil law contract, the contractor receives remuneration, which in the vast majority of cases is a one-off payment. Even though the parties may provide for the possibility of payment of remuneration in instalments (for example, upon reaching a certain stage of work performance), this in no way indicates the systematic nature of such payment.

No less fundamental difference between civil law and labour contracts is manifested when considering the subject composition of these relations and their legal status. This is manifested in three directions at once. Firstly, within the framework of a civil law contract any subjects of civil turnover possessing the necessary civil law legal personality both on the side of the contractor and on the side of the customer are allowed to participate. In addition, a civil law contract may be tripartite in nature (for example, if the customer and the recipient of the service do not coincide in one person), whereas a labour contract is always bilateral. It is fair to note that often in a civil law contract there may be a plurality of participants on one side of the contract (several performers and/or several customers), which is unacceptable in an employment contract, which is designed solely for individual regulation of the labour of a particular person with one employer. Labour legislation establishes a strict list of persons who may act as employees and employers. Secondly, labour legislation establishes criteria for employees of certain types of activities. Such restrictions apply to transport workers (Ch. 51 of the Labour Code of the Russian Federation), pedagogical workers (Ch. 52 of the Labour Code of the Russian Federation) and some others. Thus, for example, the law prohibits the employment of persons who have or have ever had a criminal record for committing a crime, who have limited legal capacity, who are ill with diseases that prevent them from working, and who have been previously...
suspended from teaching on the basis of an effective court decision (Article 331 of the Labour Code of the RF). In addition, separate criteria for such employees are provided by sectoral legislation [8]. During the conclusion of an employment contract, the employer is obliged to check the potential employee for compliance with these criteria. Thus, the employment contract acts as a kind of qualification barrier, which is designed to improve the quality of labour activity and prevent persons who for certain reasons are not suitable for such work.

In civil law relations, on the contrary, the legislator does not establish special criteria for the parties to the vast majority of contracts. Subjects of civil turnover are free to choose a counterparty and independently bear the burden of assessing the level of its professionalism [9].

Thirdly, a significant difference lies in the nature and sectoral affiliation of the parties' relations. Labour relations have a pronounced power-subordinate nature, while in the framework of the execution of a civil law contract the performer and the customer act in the status of equal subjects, and their relationship is characterised by a reciprocal nature [10]. This is manifested in the presence of powerful levers of influence of the parties to civil obligations on each other. For example, in the execution of the contract of work, the contractor has the right to withhold the result of work until the customer does not pay for it. If the customer pays the remuneration in full, then it is the customer who acquires the right to demand the final result of the work from the contractor. It is important to note that the employer has a strong leverage on the employee in the form of the possibility to apply disciplinary measures to the employee, which is not the case in civil law relations.

Significant differences between a civil law contract and a labour contract are evident when comparing their legal forms and content. Normative requirements for the execution of civil law contracts are more dispositive. Civil law imposes requirements on the mandatory observance of the written form of transactions only in certain constructions of contracts, as well as establishing a general list of circumstances of registration of transactions in writing (Art. 161 of the Civil Code of the Russian Federation). The only sanction for failure to comply with the simple written form of a civil law transaction, except in cases expressly provided for by law, is the impossibility of using testimony as a fact confirming its conclusion (Article 162 of the Civil Code of the Russian Federation). In turn, labour legislation establishes a broad list of conditions on which the parties must agree their will, as well as strict requirements for the execution of the employment contract - it must be in writing and several copies must be made. Failure to comply with the form of the employment contract, as it was mentioned earlier, does not make it non-concluded, but obliges the parties to finalise it. Ignoring this requirement by the employer is an administrative offence (part 4 of article 5.27 of the CAO RF).

Of course, the court, deciding the issue of differentiation of labour and civil law relations, should take into account the form and content of the contract concluded between the parties, but it is in no case entitled to base its decision only on these facts. Labour legislation allows the emergence of employment relations even in the absence of an employment contract, so the decisive importance for the court is the establishment of the subject matter of the relationship itself, taking into account the actual will of the parties, implemented in the actual legal relations [11]. Unfortunately, in domestic judicial practice the opposite tendency is also noticed. Deciding the issue of qualification of the contract, the courts are often inclined to motivate their position mainly on its content, without going into the analysis of the subject of legal relations of the parties [12].

In particular, the Supreme Court of the Russian Federation considered a case, in which the issue of reclassification of the contractual agreement for the installation of engineering systems and technological equipment into labour. This agreement contained multiple signs of employment relations, as it defined the employment function, place of work, procedure
of remuneration, and the work itself was performed by the performers personally and in compliance with the customer's organisation's internal regulations, which was confirmed by the decision of the court of first instance, which satisfied the claims of the performers. The Supreme Court, noted that during the consideration of the case the court of second instance gave priority to the legal registration of the parties' relations, without going into the analysis of the legal nature of the latter and without taking into account the signs of labour relations established by law [13].

Finally, the last criterion for distinguishing between civil law and labour contracts consists in the different scope and nature of social and labour guarantees provided to the employee and the contractor. Civil law, based on the presumption of equality of the parties to contractual relations and the principle of freedom of contract, does not enshrine the need to provide the performer with special guarantees of his activities, limiting itself to fixing the counter rights and obligations of the parties, thanks to which the fulfilment of obligations is ensured. Moreover, the dispositive form of civil law transactions allows the parties to define their own list of social and legal guarantees, for example, to provide for the possibility of insuring the contractor against accidents at work. Labour legislation, in an effort to protect the employee as the most vulnerable party to labour relations, has provided his status with a broad list of legal guarantees, which include:

- prohibition to work beyond the legally established maximum working hours per week;
- right to a systematic payment of wages at least twice a month, not less than the minimum wage established by law;
- right to rest, which includes the right to annual paid leave and the right to rest on weekends and public holidays;
- guarantees to certain categories of workers related to their atypical working conditions, gender and age peculiarities, etc.;
- right to pension, medical and other types of insurance, etc.

The problem of replacing labour relations with civil law relations is most clearly manifested in the issues of qualification of relations with the self-employed and relations with persons carrying out their activities through online platforms. These phenomena are new both for our country and for the whole world, in connection with which the issues of regulating the activities of the persons involved in them are still not fully resolved, which hinders the development of these institutions and restricts workers in their rights. The activity of online platforms has given rise to a previously unknown phenomenon in economics and jurisprudence - the so-called platform employment, which is "a non-standard form of employment in which organisations or individuals use an online platform to access other organisations or individuals to solve specific problems or to provide certain services in exchange for payment" [14]. In other words, platform employment refers to the paid service activities of individuals carried out using online platform technologies. It should be noted that in these circumstances, domestic judicial practice is of the opinion that the application of labour law norms to platform employment is inadmissible.

An analysis of the practice of online platforms, allows us to conclude that there are two main ways of "employment" on the online platform - by acquiring the status of an individual entrepreneur or by registering as self-employed. However, due to the lack of relevant regulatory prescriptions, so-called "shadow" platform employment takes place in practice. In this regard, it seems necessary to develop the necessary legislative framework aimed at regulating the activities of online platforms and platform employment (issues of the legal status of platform workers, social and labour guarantees for platform workers, etc.).

As another criterion for distinguishing between civil law and employment contracts, the International Labour Organization proposes to distinguish the sign of economic dependence of the employee on one person, which is expressed in the receipt of most of the income.
4 Conclusions

In summary, we consider it necessary to note that the distinction between civil law contracts and labour contracts is primarily based on the relationship into which the parties to the future obligation intend to enter. Thus, if the subject of the contract is the direct procedure for carrying out labour activities for an indefinite (in most cases) period of time, then there are labour relations. If the parties have stipulated as the subject of the contract a specifically defined result of work/service, upon the achievement of which the parties' relations are terminated, then, of course, the parties' relations have a pronounced civil law nature.

In addition to the essential differences in the subject matter of both contracts, we believe it is possible to distinguish them on the following grounds: 1) a significant difference in the organisational and managerial nature of the implementation of activities - extremely dispositive civil-law relations contrast markedly with the power-subordinate appearance of labour activities; 2) differences in the legal status of the parties to both types of contracts; 3) differentiation of the form and content of the contracts; 4) the scope and nature of the guarantees provided to the employee/executor for the implementation of activities differ.

When deciding on the qualification of a contract, courts should pay close attention to analysing the actual relations of the parties, weighing all available circumstances. If there are irremovable doubts, the latter should be interpreted in favour of recognising the parties' relations as employment relations. In order to overcome this gap in the legislation, we propose to supplement Article 19.1 of the Labour Code of the Russian Federation with the following paragraph: "when resolving disputes on the recognition of relations arising on the basis of a civil law contract as labour relations, the court must take into account the actual nature of the relationship between the parties and reflect the presence (absence) in them of signs of labour relations provided for by this Code."

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