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PECULIARITIES OF LABOUR RELATIONS WITH PROFESSIONAL ATHLETES¹

Physical culture and sports play an important role in state policy. Ukraine defined this direction in Article 4 of the Law “On Physical Culture and Sports” as a priority of humanitarian policy and an important factor in the comprehensive development of the individual and the formation of a healthy lifestyle. It is clear that the involvement of the population in physical culture and sports, as well as the success of professional athletes in international competitions, is indisputable evidence of the vitality and spiritual strength of any nation, and contributes to the creation of a positive image of the state on the international arena. Therefore, state support for physical culture and sports is one of the important directions of the socio-economic policy of our country. Involving our citizens in sports, increasing the number of people interested in taking part in competitions, forming sports schools, and developing professional sports is possible only with the creation of an effective regulatory and legal framework. In such a situation, theoretical studies conducted to improve the legal regulation of social relations, including those arising in various spheres of physical culture and sports, become relevant. Research in the field of sportsmen’s labour activity allows us to conclude an attempt to consider the field of physical culture and sports through the prism of legal regulation, in particular, to summarize, systematize and comment on the legislation that regulates labour relations in the field of sports. The article reveals the specifics of the sports contract (contract), its legal nature, and its essence. It is emphasized that labour relations in sports, despite their importance, are not sufficiently regulated. Effective regulation should begin with the legal regulation of basic terms and proper legal regulation of social relations that arise in this area, including labour relations with professional athletes.

Key words: sport, physical culture, employment contract, contract, legal regulation of sportsmen’s work.

Кисельова О.І. ОСОБЛИВОСТІ ТРУДОВИХ ВІДНОСИН ЗІ СПОРТСМЕНАМИ-ПРОФЕСІОНАЛАМИ

Фізична культура і спорт посідають важливу роль в державній політиці. Україна в ст.4 Закону «Про фізичну культуру і спорт» визначила цей напрям як пріоритетний гуманітарної політики та важливим чинником всебічного розвитку особистості та формування здорового способу життя. Зрозуміло, що залучення населення до занять фізичною культурою та спортом, а також успіхи професійних спортсменів у міжнародних змаганнях є незаперечним доказом життєздатності та духовної сили будь-якої нації, сприяють створенню позитивного іміджу держави на міжнародній арені. Тому державна підтримка фізичної культури та спорту є одним із важливих напрямів соціально-економічної політики нашої країни. Залучення наших громадян до занять спортом, збільшення кількості людей зацікавлених у прийнятті участі в змаганнях, формування спортивних шкіл та розвиток професійного спорту представляється можливим тільки при створенні ефективної нормативно-правової бази. У такій ситуації актуальними стають теоретичні дослідження, які проводяться для вдосконалення правового регулювання суспільних відносин, у тому числі які виникають у різних сферах фізичної культури та спортивної діяльності. Дослідження у сфері трудової діяльності спортсменів дозволяють зробити висновки про спробу розглянути сферу фізичної культури та спорту через призму правового регулювання, зокрема узагальнити, систематизувати та прокоментувати законодавство, яке регулює трудові відносини у сфері спорту. В статті розкривається специфіка спортивного договору (контракту), його правова природа та сутність. Наголошено на тому, що трудові правовідносини в спорті попри свою важливість не є достатньо врегульованими. Очевидно, що ефективне врегулювання має розпочинатися із правового впорядкування базових термінів, належного правового врегулювання суспільних відносин, які виникають в цій сфері, серед яких і трудові відносини із спортсменами-професіоналами.

Ключові слова: спорт, фізична культура, трудовий договір, контракт, правове регулювання праці спортсменів.

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Formulation of the problem. Currently, there is an active development of the field of sports law, as a separate and independent field of law that is part of the general legal system. This trend is explained by the fact that the sports industry attracts large investment flows and increasingly affects most spheres of social life. Although the law on physical culture and sports establishes the legal, organizational, economic and social foundations of activity in the field of physical culture and sports in Ukraine, it needs improvement, since as of today it concerns only the general foundations of activity in the field of physical culture and sports and does not contain basic and such necessary definitions for the legal regulation of the work of athletes, in particular, the law does not pay attention to the definition of such a concept as a contract with a professional athlete, its features are not established. In many countries of the world, the legislation has special provisions on sports and show business. In Ukraine, the specifics of the regulation of the specified activity are not taken into account by the current Labour Code of Ukraine, and the draft Labour Code of Ukraine, although it contains certain progressive norms regarding athletes, still does not stop at this issue, only fragmentarily regulating certain aspects in this area. The relevance and practical significance of this topic is determined by the specifics of social relations in the field of professional sports.

Analysis of recent research and publications. The work of domestic and foreign scientists is devoted to the problems of legal regulation of the field of professional sports, in particular, the regulation of the work of professional athletes, namely: S. Aleksieieva, V. Vaskevycha, M. Pysarevoi, M. Tkalycha, O. Kampi, S. Havryshko, L. Velychko, M. Kostenko, A. Kuts, O. Kushnir etc. At the same time, the specifics of labor relations in sports require in-depth research and study, in particular the issue of concluding, changing and terminating employment contracts with professional athletes.

The purpose of the article is to identify the problems of legal regulation of labor relations that arise when concluding contracts with professional athletes.

Presenting main material. The regulatory framework for regulating the work of athletes remains insufficient to this day. We can single out Article 38 of the Law “On Physical Culture and Sports”, which determines that the professional sports activities of athletes, coaches and other specialists, which consists in the preparation and participation in sports competitions among professional athletes and is the main source of their income, are carried out in

accordance with this Law, the Code of Labour Laws of Ukraine and other normative legal acts, as well as statutory and regulatory documents of relevant entities in the field of physical culture and sports and international sports organizations [1]. Thus, in fact, the regulation of sportsmen’s activities is reduced to labour and should be regulated by the main normative act for the regulation of labour relations – the Code of Labour Laws. Article 38 also specifies that an athlete acquires the status of a professional athlete from the moment of concluding a contract with the relevant entities in the field of physical culture and sports on participation in competitions among professional athletes.

Thus, the legislator allocated a special form of employment contract for professional athletes. In addition to the special form of employment contract, there are unfortunately no other special articles in the Labour Code of Ukraine that would additionally regulate labour relations with professional athletes. In connection with this, there remain many undefined issues, which in practice try to solve with the help of civil law contracts, which are built on different principles than labour contracts and have other legal requirements for their modification and termination. Due to the prevalence of this practice, some scientists believe that relations with a professional athlete should be governed by civil rather than labour law. Thus, for example, Korzh S. noted that the regulation of relations between persons who professionally engage in sports on a permanent basis and their employers must be regulated by special norms of civil law. This can happen when athletes are independent in choosing their actions and their relationship with coaches is built on an independent basis that includes a commercial component. She notes that currently in the sports environment it is quite difficult to delimit the scope of application of both labour and civil law when regulating relations between an athlete and a physical culture and sports organization [2].

Without denying the special status of sportsmen’s employees and agreeing with the specifics of their labour relations, we believe that currently the work of professional athletes should be regulated by labour law norms. It is possible to give an example of how the specificity of labour relations with athletes was clearly commented on in the decision of the Supreme Court of the United States in the case “Brown v. Pro Football, Inc.”: “We can understand how special the professional sports can be, including interest, excitement or anxiety. But we do not understand how they are special in terms of exemption from antimonopoly labour legislation” [3]. This is a strong argument for applying the same statutory

presumption to employment issues that arise in the context of professional sports.

In this regard, it is necessary to determine the boundary between labour and civil legal relations in the field of professional sports. To do this, we will consider what characteristic features are established for labour and civil relations in the field of employment.

On June 15, 2021, the Supreme Court, as a member of the panel of judges of the Cassation Administrative Court, within the framework of case No. 1840/3227/18, administrative proceeding No. K/9901/26087/19 (EDRSRU No. 97667295), investigated the issue of differences between labour and civil law contracts during inspections of State Service of Ukraine on Labour Issues. In accordance with the specified resolution, the characteristic features of labour relations are:

- systematic payment of wages for the labour process (and not its result);
- compliance with the rules of internal labour regulations;
- performance of work according to the profession (position), defined by the National Classifier of Ukraine 003:2010 “Profession Classifier”, approved by the order of State Committee of Ukraine on Technical Regulation and Consumer Policy dated 07/28/2010 No. 327;
- the employer’s obligation to provide a workplace;
- compliance with labour protection rules at the enterprise, institution, organization, etc. [4].

This concept is reflected, among other things, in the Recommendations on employment relations No. 198 of the International Labour Organization, which states that ILO (International Labour Organization) member states must provide for the possibility of defining in their legislative and regulatory acts or other means specific signs of employment relations. Among such features, the Recommendations mention “subordination” and “dependency”. In paragraph 13 of the Recommendations, “subordination” is manifested if the work:

- performed in accordance with the instructions and under the control of the other party;
- involves the integration of the employee into the organizational structure of the enterprise;
- is performed exclusively or predominantly in the interests of another person;
- performed by the employee personally;
- performed according to a schedule or at a workplace specified or agreed to by the ordering party;
- has a characteristic duration / continuity;

- requires the personal presence of the employee;
- provides for the provision of tools, materials and mechanisms by the customer.

When establishing employment relations using the “dependency” criterion, the following elements are taken into account:

- frequency of payment of remuneration to the employee;
- the fact that such remuneration is the sole or main source of the employee’s income;
- payment of compensation to the employee in kind by providing the employee, for example, food, housing, vehicles;
- implementation of such rights as the right to days off and vacation;
- payment by the party that ordered the work of the employee’s trips for the purpose of performing the work;
- lack of financial risk for the employee [5].

Thus, in our country, a legal presumption of the existence of an individual employment relationship is established in the event that the presence of one or more relevant signs of an employment relationship is determined. If to impose this legal position on the legal relations that exist in professional sports, then in order to distinguish these relations, we need to establish key points in the professional activity of the athlete and determine the scope of their regulation.

Professional activity is an activity that is a profession for a person, that is, the main type of work [6]. From a legal point of view, the performance of certain duties by a person on a professional basis means that he performs the main work for which he receives monetary support. To determine the level of professionalism of an employee, professional and qualification characteristics are used, which determine the requirements for qualification, competence and professionalism (education, necessary knowledge, abilities, skills), the main aspects of personal culture. The classification of positions in the National Classifier 003:2010 provides for the profession “professional athletes”, which has such positions as athlete-instructor, athlete-instructor of the national team of Ukraine, professional athlete [7].

In the thematic document for discussion at the Global Dialogue Forum on Decent Work in the World of Sport (Geneva, 20–22 January 2020), the concept of “professional athlete” is defined as an athlete who receives income from sports competitions and whose activities are controlled by a sports organization, such as club or federation. This definition includes (a) athletes whose only professional activity is sport, either as employees or as contracted players of sports clubs; and (b) athletes who may have

other jobs but spend a significant amount of time training and participating in sports from which they earn an income, such as athletes in some Olympic disciplines [8].

Pysareva M.V. in her dissertation research determined that a professional athlete as a subject of labour law is a natural person who has entered into an employment contract to receive remuneration (including wages) for systematic special sports and training preparation for participation in sports competitions, participation in them and shown results [9].

Therefore, an athlete acquires the status of a professional athlete from the moment of concluding a contract with the relevant entities in the field of physical culture and sports on participation in competitions among professional athletes. The Law of Ukraine "On Physical Culture and Sports" does not contain a separate article that would establish requirements for the content of contracts with professional athletes. We can refer only to Part 3 of Art. 21 of the labour Code, according to which a contract is a special form of an employment contract, in which the term of its validity, the rights, obligations and responsibilities of the parties (including material), the conditions of material support and the organization of the employee's work, the conditions for terminating the contract, including early ones, can be established by agreement of the parties [10]. The purpose of entering into a contract is to maximize the use of the employee's individual abilities, provide additional incentives for maximum return, increase the mutual responsibility of its parties, etc. The procedure for concluding contracts when accepting (hiring) employees for work at an enterprise, institution, organization, regardless of the form of ownership, type of activity and industry affiliation, as well as for citizens, is determined by the Regulation on the procedure for concluding contracts when hiring employees, approved by a resolution of the Cabinet of Ministers of Ukraine dated March 19, 1994 No. 170.

The European Association of Employers in Sport (EASE) and EURO-MEI, the European trade union sectoral body with jurisdiction in the field of sport, have proposed a non-exhaustive list of minimum requirements for employment contracts in the sports sector:

- identification of involved parties, including addresses;
- type of contract;
- the law, rules, codes of conduct applicable in the relevant country;
- coverage regardless of status;

- the period covered by the contract, including the terms and / or termination date, if any;
- work place;
- job function;
- salary / payment standards;
- working hours, holidays, schedule (work on Sunday);
- social welfare;
- signature of the employer and the employee;
- date of signing the contract [11].

Both parties also agreed that international conventions (ILO), European and national labour law standards apply to the sports sector as to any other.

A contract in the field of professional sports, as a rule, differs from a "traditional" employment contract in that it may contain provisions of sports regulations that determine many aspects of these social and labour relations. And labour law allows additional regulation of labour relations with the help of local acts on those issues that were not regulated by means of normative acts, if this does not lead to a narrowing of their rights. Regulation of labour relations with the help of local acts within the enterprise, institution, organization is one of the principles of labour law, which is expressed in the combination of state and local regulation of labour relations.

By local legal acts, it is appropriate to understand legal actions that are performed by the authorized bodies of legal entities in accordance with the law, regulate relations that arise and operate within the boundaries of this legal entity, establish individual legal status and are mandatory for the employees and participants of this organization [12]. For example, Regulations on the Committee on Stadiums and Safety of Competitions of the FFU, Regulations on Certification of Football Clubs of the First and Second Leagues of Ukraine, etc. [13].

Thus, V.V. Vaskevych notes that corporate and local acts of sports organizations, the so-called "soft law", today actually form the basis of legal regulation of relations in the field of professional sports, sports of higher achievements, including children's and youth sports [14].

It can be determined that in order to recognize the existence of labor relations between a professional athlete and a sports club, at least three basic conditions must be met: payment by the club to the athlete of monetary compensation for his / her activities, performance of work by the athlete within the framework of the club, and the existence of subordination relations between the club and the athlete. The monetary reward provided by the club to the professional athlete for the performance of his/her activities must correspond to the work

performed by him/her, and also differ from the reimbursement of expenses. It is also necessary to pay attention to an important difference between labor and civil relations – this is the possibility in civil relations to delegate the work to another person and the need to independently organize the work at one's own risk. Labor law is characterized by the fact that the labor function is performed personally by the employee and cannot be delegated to another person, which is also more in line with the professional activity of an athlete.

The situation is more complicated, in our opinion, with individual sports. It is much more difficult to prove the existence of labor relations there. After all, in individual sports quite often the athlete does not work for a club, but performs activities that are similar in most features to independent professional activities. In individual sports such as golf or tennis, where the athlete is usually free to define their own style and manner of performance, they are not so dependent on the sports club (their employer).

According to US law, for example, depending on the type of sport and the terms of the contract, it is determined whether an athlete is an employee. "Among the sports in which athletes are considered employees are football, baseball, basketball and hockey. Among those in which they are not considered employees are golf, boxing, wrestling, ice skating and auto racing. In the first group of cases described above, there was usually an owner, manager, trainer, coach or captain who had the right to direct and control the details of the player's activities. In contrast, in the second group of cases, sports usually involved sports competitions between individuals rather than teams [15].

When determining whether an athlete is an employee or an independent contractor, it is clear from the above that an important factor is whether the athlete is responsible to the customer only for the result, and not for the method and means of its performance. In the case of individual sports such as boxing, wrestling, golf, skating, skiing, tennis, miniature car racing or track and field, the organizer generally does not provide training or instruction and has no right to influence the outcome of any competition. Because these contracted athletes have developed a style and reputation that makes them a draw card, their contracts have no right to control their style or manner of competing. On the contrary, the promoter simply chooses the type of event in which the athlete will participate and schedules the performances.

But at the same time, the number of lawsuits is increasing worldwide, where individual athletes

insist on recognizing their activities as labour and are provided with the guarantees provided by labour legislation. For example, Jessica Varnish (a professional individual athlete), a former European team sprint champion, brought a claim against British Cycling and UK Sport for unfair dismissal, sex discrimination, harassment and tort after she made a protected information disclosure (i.e. reported the facts) after she failed to qualify for the 2016 Rio Olympics. Her claims related to the termination and non-renewal of her contract with Team GB Cycling. In order to hear Varnish's claims, the employment tribunal first had to determine whether she was an employee of British Cycling or UK Sport. Varnish claimed that there was a high level of scrutiny over her by cycling's governing body and UK Sport, which indicated an employment relationship. Her employment status (employee) was central to the case as it determined the employment rights to which she was entitled and the potential compensation she could receive. Although Varnish was unsuccessful at the Employment Tribunal, it was reported in March 2019 that she planned to appeal the decision against British Cycling. If this appeal is successful, it will be heard by the Employment Appeal Tribunal (EAT). The previous decision may be upheld or the EAT may set aside the decision (or part of it) in favour of Varnish. If the EAT does decide in Varnish's favour, it is likely to have an impact on the sport and governing bodies [16].

In our opinion, the application of civil labour contracts is undesirable because it will lead to a blurring of the boundaries between the branches of law. As a solution to the problem, it is advisable to conclude independent civil law contracts along with employment contracts to regulate separate relations between a professional athlete and a sports organization, in particular regarding participation in advertising, contracts with mass media, voluntary insurance contracts, etc. We consider the greatest advantage of an employment contract compared to a civil contract to be the conditions that will establish the athlete's responsibility. Thus, as a general rule, in labour relations the employee compensates for damages in an amount that does not exceed the average monthly salary. If more damage is caused, the rest is not covered by the employee, except in cases of full financial responsibility. In addition, the employer is obliged to provide employees with the necessary conditions for normal work and the preservation of the property entrusted to them. If such conditions are not met, the court may reduce the amount of damage to be compensated. In civil legal relations, in case of damage to another person, the

general rule of full compensation applies. This is of particular importance in “expensive” sports, where losses can reach quite large amounts.

In order to eliminate all the listed shortcomings and gaps regarding the regulation of labour relations with professional athletes, it is necessary to develop and adopt a special law on professional sports, which will regulate the entire complex of relations between the state and participants in professional sports, and will eliminate the existing situation of legal uncertainty. The main goal of the law should be the clear regulation of the activities of professional sports subjects in Ukraine, the definition of their role

and place in the system of labour relations, as well as the establishment of mutual rights and obligations of the state and professional sports participants.

Conclusions. Taking into account the extremely important role of employment contracts in regulating the labour of professional athletes, it seems appropriate to pay more attention to the legal characteristics of this instrument of the relationship between the employer and the athlete. Thus, in the implementation of state tasks aimed at improving the health and involvement of the majority of the Ukrainian population in sports, it is necessary to further improve the legal regulation of the athletes’ labour.

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