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Review Article

Legal Considerations for Determination of Employment Relation and Employment Contract

Nguyen Le Thu*

VNU School of Law, 144 Xuan Thuy, Cau Giay, Hanoi, Vietnam

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Abstract: The determination of employment relation is a complex legal issue, especially in the context that the newly adopted Labor Code 2019 extends its personal scope to worker working without employment relation. Also, the article on employment contract is supplemented in the way to consider all agreements on a work to be done, wage, management and supervision of one party to be employment contract, regardless of its name. These regulations are expected to better protect legitimate rights of employees, however, in practice, the implementation of such articles might be controversial because these above characteristics are not clear and based on the concept of employment relation which is not clear neither. This article will analyze some legal considerations which have been applied in the UK and European common law for determining employment relations and then provide some proposals for clarifying this concept.

Keywords: Employment relation, employment contract, Labor Code 2019.

1. Introduction

The Labor Code 2019 took effect on 1 January 2021 with many amended articles providing legal basis for the enhancement of protecting employees' rights. Among them, the articles on "employee", "employers", "employment relation" and "employment contract" are amended for the purpose of extending their scope of application. In the Labor Code 2012, the determination of

"employee", "employer" and "employment relation" are all based on the existence of "employment contract". This content is amended in the Labor Code 2019, specifically, the core legal criterion is management and supervision of one party [1, Art. 3.1, 3.2 and 3.5.]. Accordingly, the concepts of "employee", "employer" and "employment relation" refer to "the hiring, using labor" upon "an agreement" and one party "is paid, managed, controlled and supervised". Furthermore, "employment contract" is not only recognized by its name but also by the content of such agreement. An agreement will be considered as an employment contract "when two parties have an agreement

* Corresponding author.

E-mail address: thunl@vnu.edu.vn

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on work to be done, wage, management and supervision of one party, such agreement shall be considered as employment contract regardless of its name” [1, Art. 13.1]. Accordingly, a bilateral agreement on the content of employment relation shall be defined as employment contract, even when the name of such agreement is not about labor issue. These articles, on one hand, open the door for detecting hidden employment contracts which in turn establish legal base for legitimate rights and obligations of parties of employment relations, especially rights of employees and obligations of employers. On the other hand, it is legally challenged whether such regulations are detrimental to the principle of party agreement in the case where both parties do not choose to establish employment relations despite the fact that such legal relation satisfy the above articles on employment contract. The second question is that how simple terms on “management” and “supervision” are able to cover all new forms of employment relations in the Fourth Industrial Revolution. In this context, this article will first discuss the dilemma between the protection of employment relation and principle of agreement in contract. Second, some considerations for detecting core issues of employment relations will be analyzed for presenting related proposals.

2. Interpretation of Employment Relation by UK Courts

The principle of protecting employees in employment relation is one of major themes of labor regulations since the first Labor Code of Vietnam until now. The reason for this principle is that employee is considered as the more vulnerable party in employment relation and the protection of labor force is important for the socio-economic development of the nation. As a result, such protection is mentioned in many important documents of the Communist Party and State as well as in legal documents, especially the Labor Code. In details, despite general principle of agreement

in contract, an employee has more flexibility to unilaterally terminate employment contract than employer [1, Art. 36 and 37]. According to these articles, employee has the right to unilaterally terminate employment contract upon notice period of 45 days and without reason. Meanwhile, employer has such right only in the case of fault or incapacity of employee or in force majeure cases. Also, the regulations on health and safety at work require that employer shall take full responsibility in the case of accident at work or occupational diseases even when such accident occurs due to employee’s fault [1, Art. 134] and [2]. Furthermore, remedies for damages from discharge of contract are more favorable for employee than employer [1, Art. 129]. Following this trend, the article in the Labor Code 2019 on “employment contract” has been remarkably amended to be “an agreement between an employee and employer about a work to be done, wages, rights and obligations of each party in employment relations, and the management and supervision of one party”. Also, “in case two parties have agreement with different names, but such agreement owning the contents relating to work to be done, wages, and the management and supervision of one party, such agreement shall be considered as employment contract” [1, Art. 13]. It is implied that all agreements having contents of employment relations shall be employment contract, regardless of its appearance or its name. By applying this article, it is expected that all people working under “management and supervision” shall be treated as employees with a better legal protection in term of labor rights and social security rights. From this perspective, I share the point of view that this article enhances the protection of potential employees and human values. In fact, this point of view is applied in many important cases relating to labor issues. For example, the case *Ferguson vs. John Dawson & Partners* 1976 [3] is about contractor John Dawson & Partners who hired Mr. Ferguson to work in some of projects taken by the company. During working time, Mr. Ferguson had accident and required

the company to take responsibility of employer for his losses due to such accident. Consideration taken by the Court focused on the question whether Mr. Ferguson is employee when his wage had not been deducted for social security contribution but the company had the right to decide place to work and dismiss him. In this case, legal reasoning of the Court was that employment relation was determined based on reality of situation rather than the understanding of parties about such relations. In other words, despite the fact that the company considered Mr. Ferguson as an independent contractor and Mr. Ferguson also saw himself as independent contractor, legal relation between them was not automatically determined as the relation of services supplying as they had thought. The issue of reality of situation was applied in this case and was interpreted that the mentioned relation based on the use of labor force of Mr. Ferguson for doing a specific job, then it was employment relation and the related contract is employment contract. This case supports the consideration of reality of situation and also supports the determination of employment contract which is based on the nature and content rather than its appearance or name.

But on the other hand, an absolute and strict implementation of this content is at the risk of conflict with the principle of contract agreement to some extent. Such conflict might occur when a person working with a contract of which content is about employment relation but he or she does not join an employment contract. The reason could be that the related person already has an employment contract in which his/her labor rights are fully protected. In other words, for whatever reason, the determination of employment contract become complex in the case of an agreement between parties not to conclude an employment contract or the working person denies the legal status as “employee”. This situation is examined in the case *Massey vs. Crown Life Assurance* 1978 [4]. In this case, Mr. Massey had been employee in Crown Life Assurance since 1971 to 1973, then, under mutual agreement, he

became self-employed person but his job, rights and obligations stayed the same. The only change was that the company no longer paid his pension assurance and paid an amount of money instead. The legal issue in this case was that whether Mr. Massey was employee after such agreement. By referring to the content of the contract, such agreement was still considered as employment contract by its nature. However, the Court gave opinion that Mr. Massey was no longer employee at the time of dispute, regardless the nature of the contract was about employment relation because both parties had agreed on the change of his legal status as “employee”. This legal reasoning shows respect to the principle of mutual agreement of parties in the case of overlapping between employment relation and other similar ones. In other words, employment contract is not an exception of contract law, accordingly, parties have rights to determine their own legal relations, upon other conditions for validity of contract. Then, the above analysis points out that the implementation of the article on employment contract in Labor Code 2019 could be considered as an ignorance of the principle of mutual agreement of contract law. Furthermore, in recent context of multiform of hiring labor force and increased awareness of laborers about legal rights and obligations, they should be ensured with the freedom to choose which legal relations to get involved rather than to be provided with an one-size-fits-all solution.

3. Legal Consideration for the Determination of Employment Relation

The determination of employment relation is based on 1) activity of hiring or using labor and 2) the determination of “employee” and “employer” [1, Art. 3.5]. In their turns, the term “employee” refers to “management, control and supervision” as main clues for detecting such legal status and the term “employer” is also based on the above element (1) which is related to activity of hiring or using labor. In practice, the element (1) can be found in all relations on

service supplying or the relation between a worker working without employment contract and an individual/organization using such labor force, then, in my opinion, this element is not important to distinguish employment relation from similar legal relations such as relation of worker working without employment relations in supplying his or her labor force. As a result, the determination of employment relation needs to be based on the element 2) - management, control and supervision. This element is widely recognized as one of characteristics of employment relation and has been codified in both Labor Code 2012 [5] and Labor Code 2019 [6, p.79 - 81]. One characteristic of employment relation is that employer has the right to manage and control employee. However, this material has not explained clearly the term “management right”. Unfortunately, the right to “manage, control and supervise” has not been clarified in both legal document and research paper. Therefore, this part is expected to discuss this issue.

The criteria on “management, control and supervision” of employer can be understood as an interpretation of a worldwide recognition on “subordination” or “control” in labor law [7]. They are the main criteria for establishing an employment relation or an employment contract in which individual is subordinate to, controlled or dependent on another. These elements exist in many international conventions and many legal systems including the UK and most European Union Member States [8]. In addition to this main factor, there are also other criteria applied by many legal systems as a way to adapt new forms of supplying labor force. In this part, these criteria shall be analyzed for a better determination of employment relation. They include 1) subordination or control, 2) integration and 3) other relevant factors.

Firstly, subordination (or dependence) is one of the criteria suggested by ILO for determining employment relation [9, p.12]. This term is not clarified in ILO documents but is interpreted in many legal systems. This term is defined as the situation when one person works under direction of another or when a

person has the power to give orders or directives, to control their execution and to sanction the breach of subordinates in French and Italian legal systems [8]. Therefore, it could be understood that, in the context of labour law, these two terms share a similar meaning. Interestingly, while the term “subordinate” only exists in civil law systems (like Italy and France), it is not used in labour cases under common law system. Under common law, control test, which has a similar meaning, is concentrated for determining employment relations. There are many cases relating to this issue. Among them, the case *Mersey Docks & Harbour Board v Coggins & Griffiths* 1947 [10] is remarkable. In this case, Stevedores hired a crane with its driver from the harbour board under a contract which provided that the driver (appointed and paid by the harbour board) should be the employee of the stevedores. Owing to the driver’s negligence, a checker was injured. The case was concerned with whether the stevedores or the harbour board were vicariously liable as employer. The Court was in favor of the argument that the stevedores could only be treated as employers of the driver if they could control in detail how he did his work. But although they could instruct him what to do, they could not control him in how he operated the crane. As a result, the harbour board was still the driver’s employer. This legal reasoning is similar to the case *Ready Mixed Concrete (South East) Ltd v Minister for Pensions and National Insurance* [11]. In accordance to this case, “control includes the power of deciding the thing to be done, the means to be employed in doing it, the time when and the place where it shall be done. All these aspects of control must be considered in deciding whether the right exists in a sufficient degree to make one party the master and the other his servant”. Upon this argument, the related driver was still not considered as employee of the company despite the fact that he wore uniform, drove a van with logo and did his job in accordance with a schedule of the company because of the lack of direct control from the company. Thus, it is implied from

these cases that the criterion on “control” is met when such control is direct and in details rather than a general instruction. Furthermore, this criterion has been adapted to be interpreted in a more flexible way. This is the case when the power to control may be limited according to the content of the work to be performed. Particularly with regard to highly-skilled individual, functional instruction - how to perform a given job - may not be reliable or practical indicator. The changing nature of control in many employment relation, from “how to” to “what to”, is afraid to blur the distinction between the extent of control exercised in employment and self-employment relation, and thus diminish the role of the control test in distinguishing between the two. However, in my opinion, this is an adaptation of control test and an optimal solution is to further develop the control test. In fact, this criterion is still valuable in determining employment relation in new form of supplying labor force such as in the case *Uber BV (and other Appellants) v Aslam and others (Respondents)* [12].

Secondly, integration test is one of the factors for the determination of employment relation. It is an alternative to control which sees the essence of employment as the employee’s subjection to the rules and procedures of an organization, rather than as subjection to personal command [7, p. 135]. With this reasoning, integration test is a response to difficulties in applying control test to professional employees, especially highly-skilled ones such as doctors in hospital. An example of the application of integration test is *Beloff v Pressdram Ltd* [13]. Accordingly, a highly-paid journalist was unable to argue not to be employee because “the greater the skill required for an employee’s work, the less significant is control in determining whether the employee is under a contract of services.” The focus of this reasoning is “integral part” of the concerned person’s work which is cited in *Stevenson, Jordan & Harrison v MacDonald & Evans* [14]. In this case, the court’s

argument is that “is done as an integral part of the business, whereas under a contract for services his work, although done for the business, is not integrated into it but is only accessory to it.” On one hand, this focus is useful for supporting control test. On the other hand, such focus might be less effective in explaining the position of outsourced workers or sub-contractors because their work may be “integral” to the user business without them necessarily being its employees.

Thirdly, some other relevant factors are also considered for determining employment relation in the context that both above-mentioned tests are not relevant to modern forms of supplying labor force. The first factor is economic reality which means the consideration whether the worker is in business on his or her own account, as an entrepreneur or works for another who takes the ultimate risk of loss or chance of profit. In other words, one person shall be considered as employee if another person bears responsibility for such work, including both risk and benefit. This argument is supported by the case *Market Investigations Ltd v Minister of Social Security* [15] about a part-time market researcher who “had limited discretion as to when she should do the work”. The second relevant factor which is applied in employment law is mutual obligation. Although the term “mutual obligation” refers to a characteristic of contract in general, it has a separate meaning in employment law with specific reference to the contract of employment, this was based on the presence of mutual commitments to maintain the employment relation in being over a period of time. It is an adaptation of the idea that the contract of employment is more than just a contract to serve in return for wages; in addition, there is a second tier obligation consisting of mutual promises of further performance [7, p. 138]. It means that an employment relation should include not only rights and obligations between parties for a work or a job in a specific period of time but also an agreement about the continuity of such rights and obligations.

4. Some Proposals for the Determination of Employment Relation and Employment Contract

Based on the above analysis, this article aims at highlighting main factors of employment relation and then provides the following proposals for consideration.

The first proposal is about a strict recognition of principle of agreement from contract law in designing regulations on employment contract. The reason is that, from legal perspective, this recognition strengthens the unification between contract law and employment law. From a practical point of view, the recognition of all agreements owning employment content used to be seen as one favorable regulation for potential employee who is vulnerable party in employment contract. Accordingly, with the support of this regulation, a person has more chance to get employee status. However, in my opinion, this argument is out of date, which is only relevant in the context of low awareness of potential employee. With the development of labor market, recent enhancement of legal awareness and a comprehensive protection of labor rights from the Labor Code 2019, such way of protection is unnecessary. Furthermore, with new forms of working relation and the fact of employee working for more than one employer, this regulation shall require more unnecessary obligations upon both parties in such relation. In details, sub-law document could regulate that “in case two parties have agreement with different names, but owning the content of employment relation, such agreement shall be considered as employment contract, except both parties agree otherwise”. This clarification shall, on one hand, still protect people from not bearing the employee title due to the lack of legal knowledge on his or her legitimate right, and on the other hand, open a door for a flexible and relevant approach to employment contract.

The second proposal is that control (or subordination, management, supervision) should not be the only factor for nor play a decisive role in the determination of employment relation. It has been discovered

that this test cannot be applied effectively in examining modern employment relation. Other factors should also be considered for such purpose. All factors, including control, integration, economic reality and mutual obligation, should be seen as blood indicators in the way: a bad blood indicator should not be concluded automatically to a specific disease, because of new discovered type of disease, such conclusion must be based on an overall consultancy of all indicators. In a similar way, employment relation needs to be further clarified in sub-law documents which should regulate some standards for the determination, among other, degree of integration, autonomy and agreement on continuity or a work on regular basis. This type of clarification is also important for a type of contract which is referred but is not defined in the Labor Code 2019 - seasonal contract. A supplementation of requirement for “agreement on continuity” could be an effective tool for the distinction between employment and seasonal contract.

5. Conclusion

The above analysis is generally summarized that employment relation is complex to be determined, especially in the context of new forms of working relation. As a result, a traditional indicator for this relation, which is control or subordination, should no longer be the only base for or play the decisive role in the establishment of employment relation. Further consideration on other factors is an effective solution. Also, first of all, such relation should be based on main principles of contract law, among others, principle of agreement.

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