

Special features of the legal status of the employees in case of bankruptcy as per the Russian legislation

Yulia Valerievna Vasilyeva and Tatyana Mikhailovna Zhukova

Perm State National Research University, Bukireva str., 15, Perm, 614990, Russia
Email: ktpiso@live.ru

Abstract. The article is devoted to the complex system research of the issue of the legal status of the employees of the company enduring a bankruptcy case. The authors pay attention to the fact that in accordance with the current Russian legislation, the employee does not have the right to initiate a bankruptcy case. At the same time it is noted that this problem has been solved in the draft Federal law where the amendments are introduced particularly into the legislation that covers insolvency (bankruptcy). Attention is given to the problems of applying the International Labour Organization Convention #173 covering the claims of the employees in case of the insolvency of the employer that was ratified in Russia in 2012. The four models are analyzed that protect the rights of the employees in case of the employer insolvency, developed by American researcher G. Johnson. The evaluation is given for the Russian legislation current status in the mentioned sphere.

[Vasilyeva Y.V., Zhukova T.M. **Special features of the legal status of the employees in case of bankruptcy as per the Russian legislation.** *Life Sci J* 2014;11(9s):211-215] (ISSN:1097-8135). <http://www.lifesciencesite.com>. 41

Keywords: insolvency (bankruptcy), inability to pay, legal status of the employees, labor legislation, civil procedural legislation, creditors' meeting, privileges

Introduction

The problem of studying the legal status of the employees of the company that endures the bankruptcy case is apparently essential currently, as the number of the bankruptcy cases is increasing; and one of the most important social consequences of declaring a bankrupt is the problem of paying the salary and the social fee debts by the employer.

The Russian Federation labor legislation fully and clearly regulates the legal relations resulting from mass dismissals. With this, the mechanisms that guarantee the protection of the employees during mass dismissals are often inapplicable in case of the bankrupt company liquidation [1].

The rights of employees in case of bankruptcy

Since the bankruptcy case is started, the debtor's employees become one of the participants of the relations associated with the insolvency. The legislator included them into the group of creditors. In accordance with Article 2 of the bankruptcy law, these are persons having the right to set claims to the debtor in relation to the financial and other obligations, to mandatory payments, dismissal payments and salaries for people having a labor contract concluded.

However, on spite of the fact that the legislator defines an employee as one of the creditors in a solvency case, the employee is not a scheduled creditor. This first of all means that an employee cannot initiate a bankruptcy case.

This, in accordance with Article 4 of Federal Law dd October 26, 2002, #127-FZ, "On Insolvency (Bankruptcy)" (hereinafter referred as the Bankruptcy

Law), the salary and dismissal liabilities owed to persons having a labor contract, is not considered when defining the bankruptcy indication features of the debtor.

With this, on October 16, 2013, the Russian Federation State Duma passed the first reading of draft Federal Law # 316848-6 «About Introducing Changes into Article 4.5 of the Russian Federation Administrative Violations Code and Federal law "On Insolvency", that gives the right to initiate the bankruptcy procedure to the employees of the company that does not pay the salary.

It is mentioned in the draft law that the salary debts will be taken into account when defining the bankruptcy indication features, the employees will be included into the group of the scheduled creditors and the manager of the company will have an obligation to start the bankruptcy procedure in case there are salary debts, dismissal payment debts and other debts payable to the employees for the period exceeding 3 months.

In our opinion, this draft law is necessary, as the bankruptcy institution influences the economy; the quicker the creditors react to the "malfunction", the better the civil turnover is. Besides, this will be one of the guarantees for the legal right of the employees to get their salary.

At the phase of starting the claim for bankruptcy and starting the bankruptcy case procedures, the rights of the employees are secured by the fact that the debtor in his claim for bankruptcy gives the size of the salary and dismissal fees payable. In case the claim is raised by the creditor, the debtor is to give the size of the salary and

dismissal fees payable in his comment. Besides, the debtor is to send a copy of his claim to the representative of the employees in case he has been elected.

Article 2 of the Bankruptcy Law says that the debtor's employee acts in the bankruptcy case through a representative – i.e. a person authorized by the debtor's employees to represent their legal interests during the procedures activated in the bankruptcy case, and having the rights of a person participating in the bankruptcy case. With this, if the employee is the only one, and in case there are disagreements between a specific employee and the bankruptcy officer, the employee has the right to act on his own.

At the phase of monitoring, the temporary manager chooses the date for the first meeting of the creditors and informs about it the discovered scheduled creditors, the authorized body, and the representative of the debtor's employees who have the right to participate in the first meeting of the creditors.

However, in spite of the opportunity to participate in the creditors' meeting as provided by the legislator, the representative of the employees has the right to participate without vote. The participation of the employees' representative is limited to the opportunity to speak on the agenda of the meeting.

The bankruptcy officer is also to provide a free access to the copies of the documents associated with the creditors' meeting, to the representative of the employees.

It is also necessary to mention that when the employees continue to work in the company and new personnel is hired during the bankruptcy procedures, the bankruptcy official should make all the deductions from their salaries (child support, income tax, trade union contribution and insurance payments) and all the payments imposed on the debtor by the federal law.

Labor disputes between the debtor and the employee are considered in the order defined by the labor legislation and the civil procedural legislation. In case of an individual proprietor bankruptcy, the salary payment and dismissal payment claims of the employees remain in force also when the bankruptcy proceedings are over.

The order of including the debtors' employees claims into the creditor's register also differs from that of the other creditors. Thus, in accordance with paragraph 2,3 of Item 6 of Article 12 of the Bankruptcy Law, Item 32 of Resolution #35 dd June 22, 2012 of the Plenum of the Supreme Arbitration Court of the Russian Federation, the salary payment and dismissal payment claims of the employees working with a labor contract are included

into the register by the bankruptcy officer or by the registrar; the claims are removed from the register by the bankruptcy officer or the registrar exclusively based on the court decisions in force.

In connection with that, there is no need to set up the mentioned claims in accordance with Article 71 or Article 100 of the bankruptcy law. The bankruptcy officer, solely and within a reasonable time, in accordance with paragraph 3 of item 1 of Article 142 of the bankruptcy law, is to include these claims into the register, based on the debtor's documents confirming the debt to his employees that incurred before the bankruptcy case was started (also with the account for the information that was given in the debtor's petition for bankruptcy – paragraph 4 of item 2 of Article 37 of the bankruptcy law).

The salary debt that accumulated during periods that followed the bankruptcy case start, and the dismissal payments debt for people dismissed after this date, are not included into the register, because this debt refers to current payments and is to be paid as a priority (Article 5, paragraph 3 of Item 3 of Article 2 of Article 134, Item 2 of Article 136 of the bankruptcy law).

In case the bankruptcy officer does not solely include the employee claim into the register, the employee has the right to make a request to the bankruptcy officer asking to include the claim into the register.

One of the guarantees of the employees' rights is keeping the labor contracts in force and transfer of the employer's rights and duties to the buyer or to the newly opened open-stock company in case the enterprise is sold or the assets are replaced (Articles 110? 115 of the bankruptcy law). The same is true for the norm that provides for satisfying the claims of the debtor's employees before the settlement agreement is made in the bankruptcy process (Article 158 of the bankruptcy law).

Problem of meeting the claims of the employees

But of course the principal guarantee of the rights of the employees in case of insolvency (bankruptcy) of the employer is their status as compared to the status of other creditors as referred to the priority of the claim satisfaction (Article 134 of the bankruptcy law).

In accordance with Article 132 of the bankruptcy law, the salary payment claims are considered to be the second priority which is considered to be one of the privileged. Nevertheless, there are significant difficulties in the realization of the legal right of the employees for getting their salaries.

In 2012 the Russian Federation ratified International Labour Organization Convention #173

covering the claims of the employees in case of the insolvency of the employer, this accepting the obligations resulting from section II of the Convention which protects the claim rights of the employees through privileges. The explanatory note to the draft Ratification Law says that the Russian Federation legislation in principle complies with the Convention regulations and its ratification will not cause additional expenditures from the federal budget and will not result in adopting new federal laws and other normative legislative acts. However this is not quite true. The ratification of the international legislative acts imposes not only current obligations but also future efforts aimed at improving the existing guaranties and increasing the efficiency of the employee rights protection. The Russian Federation legislation should be developed to fully comply with Convention #173 and to adopt the most successful foreign regulating models for corresponding relations.

In particular, Article 1 of Convention #173 contains a wider definition of the employer "insolvency" notion than that in Russia, that includes the cases of opening the procedure associated with the proprietor's assets, for the purpose of satisfying the claims of the creditors on a collective basis (item 1) and other situations when the claims of the employees cannot be satisfied due to the financial position of the proprietor; for example, in case the assets amount is considered to be non-complying to the claims set for opening the procedure referred to insolvency (item 2).

In Russia, the mechanism of the privilege is used only within the framework of the insolvency procedure. And even in this case, it is not always that the rights of the employees are guaranteed. For example, the privilege is not actually activated in case of the bankruptcy of the employer who has insignificant assets or does not have them at all. It is often that the money in the bankrupt assets is not enough even for covering the current expenses, and payments stop short of the salaries. In accordance with Article 142 of the bankruptcy law, the claims of the creditors which are not satisfied due to the lack of property of the debtor are considered to be redeemed. This deprives the employees of their right to get their salaries, and the privileges guaranteed to them turn to be formal.

Article 9 of Convention #173 proposes a way out of this situation through creating guarantee establishments. This mechanism is also fixed in Article 25 of the European Social Charter (not ratified by Russia). In the European Union, the Directive is in force, 2002/74/EC of the European Parliament and of the Council of 23 September 2002 amending Council Directive 80/987/EEC on the

approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer. This directive was revised in 2002 specially for the purpose of fixing the insurance mechanism of guarantying the rights of the employees.

The insurance mechanism is widely spread in the world, and the compensation of the salary through the guarantee establishments is not only associated with the bankruptcy procedure but also with other cases when the claims of the employees cannot be satisfied in accordance with the legislation. In different countries, the mechanism of privileges and the mechanism of guarantee funds are used in many variants, both independently and in complex.

Principal models protecting the rights of the employees in case of their employer insolvency

American researcher G. Johnson sets four principal models protecting the rights of the employees in case of their employer insolvency [2].

The first one declares the priority of the employee's rights (*the pro-employee approach*). This model is interesting because it provides for a full insurance from unemployment, which is not limited to the compensation payments but allows the employee also to get about 80% of the minimum wage amount set by the state, for a two-year period. Besides, the system is aimed at increasing the competitiveness of the unemployed persons through organizing trainings and sending them to work for the purpose of the quickest employment. The model is used in this or that variant in Brazil, Chili, Columbia, Indonesia, Malaysia [3].

For Russia, this variant is interesting by the fact that it allows to solve two problems simultaneously: to compensate for the salary in case of the employer's insolvency, and to insure against unemployment. The latter was eliminated in Russia in 2000, and after that the protection of the rights of the unemployed for getting payments and other social support was organized through the federal budget, but based on significantly lower norms than those provided by the international acts (nowadays the unemployment allowance does not reach the minimum living wage). Increasing of the unemployment allowance is not possible within the existent RF system, as it would demand to significantly increase the federal budget expenses. But this problem can be solved by creating a unified fund that would guarantee both compensation of the salary in case of the employer insolvency and insurance against unemployment in general.

The second model declares the priority of the debtor's rights with no insurance (*Bankruptcy priority-No insurance approach*). The priority of the

employees rights is not even mentioned by it. This model is used for example in Mexico. In spite of the comparatively new legislation in this sphere, it is noted in the literature that such regulation is based on old law principles aimed in the first place at protecting the rights of the creditors whose claims are secured by the pledge of property [4]. The employees very often do not have a probability of getting any compensation fee and are to independently refer to the social employment services to find a new job, the labor market is not sufficiently developed. It is obvious that this model is more suitable for liberal economics. In particular, sometimes the legal regulation of the status of the employees in the USA is included into this model, where the employee claims refer to the third category of claims not secured by anything [5]. But in the USA, the balance of interests is achieved with Articles 1113, 1114 of the US “Bankruptcy Law” which provides for special conditions for collective agreements and insurance payments for retiring employees [6].

The third model covers the priority of the debtor’s rights with availability of the guarantee funds (*Bankruptcy priority–Guarantee fund approach*). This model can be called a hybrid one, as it gives some priority to the rights of the employees on one hand, but on the other hand – it accepts unemployment insurance acknowledging the fact of lack of property for satisfying all the creditors’ claims. This regulation system is spread in developed countries – Italy, Japan, Denmark, Spain and others. Its vivid advantage is in guarantees for the compensation payments, together with the unlimited access of other creditors to the possible satisfaction of their claims. Such approach seems to be optimal for the states with socially oriented economics, including Russia.

And finally, the fourth model declares the absence of priorities with availability of the guarantee funds (*No priority – Guarantee fund approach*) and is used, in particular, in Germany. With this approach, all the creditors, including employees, are given equal opportunities to satisfy their claims. The claims of the employees which are not satisfied during the insolvency procedure can be compensated for at the expense of the National Insolvency Fund for Retirement Pensions. To compensate for its expenses, the Fund, by way of subrogation, can forward its claims to the insolvent employer together with other creditors.

As of today, the guarantee funds which allow to fully or partially cover the debts to the employees, do not exist in every country. There are no such funds in the Russian Federation, although the scientists have repeatedly mentioned the necessity of their creation [7, 8]. With no doubt, the creation of

the guarantee funds is not an easy task. Some of the countries introduce them gradually, laying the obligations during the transfer period onto the temporary funds financed at the expense of the state, for example in Australia [9]. The system of ensuring the salary payments obligations by the employers has its weak points, and in particular – they are expensive [10, 11].

With this, we can’t but admit the obvious social advantages of this approach for Russia; it eliminates the social tension and provides for Russia’s legislation reaching of the international labor norms. Besides, the Russian Federation already uses similar mechanisms, and in particular – for providing payments for those having labor injuries after their employer is declared bankrupt. In accordance with Article 23 of Federal Law # 125 dd 1998 “On the Mandatory Industrial Accident and Professional Disease Social Insurance”, in case of the employer – the legal person – insolvency, in is mandatory that the employer makes capitalized payments to the Fund of Social Insurance of the RF – to secure the social payments to the employees. It is important that the industrial accident and professional disease social insurance system itself was introduced in Russia as a countermeasure for mass violations of the employee right to get insurance payments in case of the employer liquidation. The civil mechanism of compensation payment by the employer itself that had existed before that, did not guarantee the rights to the injured in case of insolvency. Since 2000, the insurance is performed by the national Fund of Social Insurance which collects insurance fees from the employers.

Finally, since 2014, the system of guaranteeing the rights of the insured came into force in Russia for forming the funded component of the retirement pension. In accordance with Article 6 of Federal law #422 dd 2013 “On Guaranteeing the Rights of the insured in the System of the Mandatory Pension Insurance of the Russian Federation during the Formation and Investing of the Pension Accruals...”, the Insurance Agency will pay the guaranteed pension compensation in case the insurer (the Pension Fund and private pension funds) fail to pay, including situations when the fund-participant is acknowledged as a bankrupt and is experiencing a bankruptcy procedure.

Conclusions

Thus, the Russian legislator does have a definite experience in this sphere. This experience needs to be deepened by the political foresight, and one needs to recognize that in the conditions of the increasing economic uncertainty the meaning of the privilege as an institution is gradually descending,

and the role of the guarantee institutions is strengthening. Besides, the liquidation of the employer as the necessary grounds for the privilege mechanism start, does not comply with the general tendency observed in the development of law, when the principal target of the collective procedures is the restoration of the employer's activities but not its destruction.

Corresponding Author:

Dr. Vasilyeva Yulia Valerievna
Perm State National Research University
Bukireva str., 15, Perm, 614990, Russia
Email: ktpiso@live.ru
Tel: +7 (342) 239-65-49

References

1. Klimova M.A. Protection of the Employee Labor Rights // "Rossiyskaya Gazeta" Library. 2008. Issue # 9. P. 88.
2. Gordon W. Johnson, Insolvency And Social Protection: Employee Entitlements In The Event Of Employer Insolvency / Legal & Institutional Reforms of Asian Insolvency Systems. 2006. P. 4.
3. Insolvency Systems in South Africa. Comparative Review of Employee Claims Treatment /Prepared by Gordon Johnson. United States Agency for International Development. October, 2011. P.12.
4. Rowat, Malcolm, Reforming Insolvency Systems in Latin America, Public Policy for the Private

Sector // The World Bank Group, Note No. 187, June 2002.

5. Posthuma, Richard A., Labour and Employment Laws in Mexico and the United States: An International Comparison // Labour Law Journal, № 20 (2000). P. 21.
6. US Bankruptcy Code, 1978. [E-document]. URL: http://www.law.cornell.edu/uscode/uscode_sec_11_00001113----000-.html (date of referring: 12.03.2014).
7. Lyutov N.L.. Efficiency of the International Labor Law Norms. M.: Prospekt. 2014. P.240.
8. Terenytyev A. Problems of Protecting the Employee Rights in Case of Insolvency (Bankruptcy) of the Employer // Labor Law. 2010. # 6. P. 59.
9. Insolvency Overview: Brazil, Global Insolvency // Felsberg e Associados (2000), Law Database, P. 38.
10. Bronstein, A.S. Comparative study in Edward Yemin and Arturo S. Bronstein (eds.): The protection of workers' claims in the event of the employer's insolvency. Geneva, ILO. 1991. PP. 52-54.
11. Insolvency Systems in South Africa. Comparative Review of Employee Claims Treatment /Prepared by Gordon Johnson. United States Agency for International Development. October, 2011. P.20.

5/29/2014