CHAPTER 3. LEGAL REGULATION OF EMPLOYMENT CONTRACT TERMINATION IN CASE OF ONE-TIME GROSS BREACH OF WORK DUTIES IN UKRAINE: CURRENT STATE OF AFFAIRS AND AREAS OF IMPROVEMENT

3.1. Subjects of Dismissal in case of One-time Gross Breach of Work Duties

In labour law doctrine, the concept of "legal person" is one of the most important. It is traditional to define a legal person as a party to a legal relationship, a rights-holder and duty-bearer. The construction "holder of rights-holder and duty-bearer" covers individuals and legal entities. N. M. Onishchenko believes that a legal person is a person or organization by which the state recognizes the ability to be holders of subjective rights and legal obligations [1]. According to V. Yu. Urkevych, the categories "legal person" and "participant in legal relationship" are correlated as a whole and part, therefore, the participant in legal relationship is a person who has all the characteristics of a legal person, certain rights and obligations that arise as an effect of these legal relations [2].

[1] Zaichuk, O. V., Onishchenko, N. M. (Eds.). *Theory of State and Law*. K.: Jurinkom Inter, 2006. 688 p.

[2] Urkevych, V. Yu. *Agrarian legal relations in Ukraine*. Extended abstract of Doctor's thesis. Yaroslav Mudryi National Law University. – Kh., 2007. 39 p.

Subjects of labour law are a required element of labour and associated legal relations.

In accordance with para. 1 of Art. 41 the LC of Ukraine the participant in legal relationship arising from termination of the employment contract at the initiative of the employer in the case of one-time gross breach of work duties, are the heads of enterprises, institutions, organizations of all forms of ownership (suboffice, representative office, branch, other separate division), their deputies, chief accountants, their deputies, as well as officials of revenue and duties bodies nominated for special ranks and officials of central executive bodies implementing national policy in public financial control and price control.

The importance of a clear and unambiguous understanding of the law application body of the participant in the legal relationship in question is confirmed by an example from case law.

On 12 February 2008, N. was appointed to the position of the Doctor-in-Charge of Department No. 1 of the Public Institution “Polyclinic No. 2” of the Public Affair Administration. On 9 July 2010, the Chief Physician of the State Institution K. issued Order No. 54 on the dismissal of the Doctor-in-Charge N. for one-time gross breach of work duties (para. 1 of Art. 41 of the LC of Ukraine). By order of the Chief Physician No. 174-k of 25 August 2010 N. was dismissed on that ground from 25 August 2010, since she had been on the sick leave, accordingly, the actual day of her dismissal was the first day of her return to work.

On 22 September 2010, N. filed a lawsuit to the Shevchenkivskyi District Court of Kyiv against the State Institution “Polyclinic No. 2” of the State Affairs Administration on reinstatement at work, recovery of average earnings during forced truancy and compensation for non-pecuniary damage.

Satisfying the lawsuit, the court of first instance, with which the appellate court agreed, concluded that in accordance with para. 1.1 of the Regulation on Department No. 1 of the Public Institution “Polyclinic No. 2” of the Public Affair Administration (PAA) this Department is a structural subdivision of the specified institution. Paragraph 1.2 of this Regulation stipulates that the issue of economic activity in the Department No. 1 is decided by the management of the polyclinic on behalf of the deputy head of the PAA, therefore, Department No. 1 is a structural subdivision that does not take part in the management of the institution, in particular, in the management of its administrative and economic activities, therefore, N. is not engaged in the governing bodies of the health institution, hence her dismissal under para. 1 of Art. 41 the LC of Ukraine is groundless.

However, according to the panel of judges of the Judicial Chamber for Civil Cases of the High Specialized Court of Ukraine for Civil and Criminal Cases, this conclusion is erroneous. In accordance with para. 1 of Art. 41 the LC of Ukraine, an employment contract may be terminated on the initiative of the owner or his/her authorized body can be terminated in case of one-time gross breach of work duties the heads of enterprises, institutions, organizations of all forms of ownership (suboffice, representative office, branch, other separate division). If the head of enterprise is always the head of the legal entity, the head of a suboffice, representative office, branch, other separate division, can be the head of a subdivision without a legal status, but according to the scope of powers, he/she (the head) performs organizational and administrative functions, is responsible for the work of the structural subdivision.

Accordingly, in the consideration of the lawsuit for unlawful recognition of the order to dismiss a person under para. 1 of Art. 41 the LC of Ukraine, the court is required to establish whether a person has been the head of enterprise,

institution, organization of all forms of ownership or suboffice, representative office, branch, other separate division, as well as whether he/she has committed one-time gross breach of work duties. Furthermore, in considering whether the head is the person with whom the employment contract can be terminated, according to Part 1 of Art. 41 the LC of Ukraine, both property and territorial separation of the structural unit, headed by him/her, should be taken into account, as well as take into account that the general provisions on the organizational structure of the enterprise, provided for in Art. 64 of the Economic Code of Ukraine, the enterprise has the right to create a suboffice, representative office, branch, other separate division, agreeing on the placement of the latter with the relevant local governments in the manner prescribed by law. These separate subdivisions do not have the status of a legal entity and operate on the basis of the regulations on them approved by the enterprise. Therefore, the persons who head such divisions have the status of the head of a separate division, which performs organizational and administrative functions.

It is established that according to the Regulations on Department No. 1, the latter is a structural division of the State Institution “Polyclinic No. 2”. The Job Description of the Doctor-in-Charge of the Department No. 1 determines that he/she manages this Department, organizes its treatment-and-prophylactic and administrative-economic activity. Paragraphs 2.7 and 2.13 of the Job Description stipulates that the Doctor-in-Charge controls the provision of proper sanitary and hygienic conditions for department operation and is responsible for the state of its work and the level of medical care for patients. The Doctor-in-Charge is responsible for improper performance of functional duties provided by the Regulation on Department No. 1. The content and scope of functional duties of Doctor-in-Charge, provided by the Regulations of Department

No. 1 and the Job Description, gives reason to argue that the Doctor-in-Charge of Department No. 1 is the head of a separate division, who has performed organizational and administrative functions[1].

Paragraph 1 of Art. 41 of the of Ukraine regarding officials of revenue and duties bodies nominated for special ranks, as subjects, covered by this ground for dismissal, requires clarification. Since, on 21 May 2014, the Cabinet of Ministers of Ukraine decided to establish the State Fiscal Service of Ukraine (SFSU) as a central executive body, directed and coordinated by the Cabinet of Ministers, having reorganized the Ministry of Revenue and Duties of Ukraine by transformingit[2]. This body, the body of revenue and duties, is now included in the Classification of Public Administration[3].

The separation of service in the SFSU as an independent type of public service is logical, because it enables proper implementation of the key areas of public policy on national security in the economic sector, provided by Art. 8 of the Law of Ukraine "On Fundamentals of National Security of Ukraine"[4], such as:

– creating favourable conditions for sustainable economic growth and a more competitive national economy;

– fast-tracking of innovative infrastructural and institutional change in the economy, improving the

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[1] On reinstatement at work, recovery of the average salary during forced truancy, compensation of non-pecuniary damage (case no. 6–3105sk11). http://reyestr.court.gov.ua/

[2] Resolution of the CMU on establishment of the State Fiscal Service of Ukraine No. 160 of 21 May 2014. *Ofitsiinyi visnyk Ukrainy*, no. 46, 2014. Art. 1213.

[3] Order of the State Statistics Service of Ukraine on approval of the Classification of Public Administration No. 143 of 07 May 2013. http://zakon.nau.ua/doc/?uid= 1157. 2162.0.

[4] Law of Ukraine on fundamentals of National Security of Ukraine No. 964-IV of 19 June 2003. *Vidomosti Verkhovnoi Rady Ukrainy*, no. 39, 2003. Art. 351.

investment climate and increasing the effectiveness of investment processes;

– stimulating development for scientific high-tech industries;

– overcoming "shadow" economy by reforming the tax system, enhancing finance and investment as well as restraining international capital outflow, reducing unquantifiable extra-bank cash circulation;

– providing budget development, an internal and external currency protection, its stability, protection for investor's interests and financial markets.

According to the Regulation on the State Fiscal Service of Ukraine, approved by the Resolution of the Cabinet of Ministers of Ukraine No. 236 of 21 May 2014[1], SFSU is a central executive body, thereof activities are directed and coordinated by the Cabinet of Ministers of Ukraine.

The key missions of SFSU include:

– implementation of national policy: (a) in taxation; (b) in the field of state customs; (c) in counteracting offenses in the application of tax and customs laws and the exercise within the statutory powers of control over the receipt of taxes and duties, customs and other payments to budgets and state trust funds; (d) in the field of control over the production and circulation of alcohol, alcoholic beverages and tobacco products; (e) in administering the single contribution, as well as countering offenses in the application of the legislation on the payment of the single contribution; (f) regarding control over the timeliness of settlements in foreign currency within the period prescribed by law; compliance with the procedure for cash payments for goods (services); as well as the availability of licenses to conduct business activities subject to licensing in accordance with the law and trade patents;

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[1] Resolution of the CMU on the Regulation on the State Fiscal Service of Ukraine No. 236 of 21 May 2014 p. *Ofitsiinyi visnyk Ukrainy*, no. 55, 2014. Art. 1507.

– submission to the Minister of Finance of Ukraine of proposals regarding the formation of: national policy: (a) in taxation; (b) in the field of state customs; (c) in counteracting offenses in the application of tax and customs laws and in the control over the receipt of taxes and duties, customs and other payments to budgets and state trust funds; (d) in the field of control over the production and circulation of alcohol, alcoholic beverages and tobacco products; (e) regarding control over the timeliness of settlements in foreign currency within the period prescribed by law; compliance with the procedure for cash payments for goods (services); as well as the availability of licenses to conduct business activities subject to licensing in accordance with the law and trade patents.

Resolution of the Cabinet of Ministers of Ukraine No. 311 of 6 August 2014[1] provided for formation by legal entities of public law territorial bodies of the State Fiscal Service of Ukraine, as well as reorganization of the territorial bodies of the Ministry of Revenue and Duties of Ukraine by joining the relevant territorial bodies of the SFSU. The SFSU exercises its powers directly and through territorial bodies, duly established. In this service and in its territorial bodies, divisions of tax militia act.

At the same time, the current legislation continues to utilise the category of "revenue and duties".

The staff of revenue and duties is a set of employees, who on the basis of the employment contract perform their assigned work duties in the bodies of the State Fiscal Service of Ukraine, and includes: officials, tax militia, academic teaching and academic staff of educational institutions and scientific institutions, administrative technical staff and service staff.

[1] Resolution of the CMU on the formation of territorial bodies of the State Fiscal Service and the recognition of some acts of the Cabinet of Ministers of Ukraine as repealed No. 311 of 6 August 2014. *Ofitsiinyi visnyk Ukrainy,* no. 64, 2014. Art.1765.

An attempt to legally define the category of "revenue and duties officials" is in Part 1 of Art. 569 of the Customs Code of Ukraine[1]: "The employees of the revenue and duties authorities responsible for achieving the objectives referred to in Article 544 of the Code, ensuring organisational, legal, human resources, finance, logistics support of the activities of such authorities shall be their officials. The revenue and duties officials shall be public servants."

According to A. M. Arhunova, this definition cannot be considered successful, because it does not provide a complete picture of this category of employees of the bodies in question: it is unclear who can apply for the relevant positions, what are the requirements for these employees, as well as these persons' status is vague. She argues that an official of revenue and duties bodies is a citizen of Ukraine who holds a full-time position in one of the revenue and duties bodies, has taken the Oath of Public Servant, has received a special title, which is paid from the State Budget of Ukraine, and according to the law is responsible for direct achieving of the objectives of revenue and duties bodies, ensuring organisational, legal, human resources, finance, logistics support of the activities of such authorities. According to the scientist, the essential features of revenue and duties officials are: a) citizenship of Ukraine; b) holding a full-time position in one of these bodies; c) taking the Oath of a public servant; d) ability to perform the missions assigned to the bodies of revenue and duties, and job responsibilities assigned to these persons, according to age, educational and qualification level, health, work experience, business and moral qualities; e) the legal status of these persons is determined by the Tax and Customs Codes of Ukraine, and in the part unregulated by them, by the Law of Ukraine "On Public Service", the LC of Ukraine

[1] Customs Code of Ukraine (approved by Law of Ukraine No. 4495-VI of 13 March 2012) *Vidomosti Verkhovnoi Rady Ukrainy*, no. 44–48. 2012. Art. 552.

and other legal regulations; f) performance by a person of his/her official duties in the best interests of the State and on its behalf, control of the activity of this official by the State and in cases of coercion applied to him/her by law; g) restrictions related to the admission and service in these bodies; h) nomination of a special rank; i) remuneration of the official from the State Budget of Ukraine[1].

According to para. 1 of Art. 41 the LC of Ukraine, another subject of one-time gross breach of work duties is an official of the central executive body that implements national policy in the field of public financial control.

The authors of the integrated training and certification complex State financial control: Review and audit recognize financial control as a method of management function of the State, involving: a) consolidation of legal provisions establishing the procedure for the use of financial resources by business entities; b) monitoring or other control actions for compliance with these provisions; c) detection of offenses in the use of financial resources and their elimination; d) blocking of unlawful financial transactions and taking actions to compensate for losses caused to the State by business entities and citizens[2]. Public financial control is one of the most important functions of public administration, aimed at identifying deviations from the accepted standards of legality, expediency and efficiency of management of finances and other public property, and in the presence of such deviations, at the timely appropriate corrective and preventive actions.

O. P. Pashchenko argues that the key features of financial control is that this activity: a) is associated with the use

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[1] Argunova, A. M. *Legal regulation of labor relations of officials of revenue and duties*. Ph.D.'s thesis. Scientific Institute of Legal Framework for Innovation Development of NALS of Ukraine. Kh., 2014. 219 p.

[2] Hermanchuk, P. K. Stefaniuk, I. B., Ruban, N. I. et al. State financial control: Review and audit. K.: NVP AVT, 2004. 424 p.

of financial control powers granted to financial control bodies to verify compliance with financial and legal provisions, and in case of offenses, with the application of appropriate actions; (b) is carried out by authorized state bodies; (c) is related to operating with provisions of law, resulting into documentation; (d) is aimed at creating appropriate conditions for financial control by the relevant entities; (e) is conducted using appropriate methods, means and techniques; (e) is a set of ordered control actions at certain stages; (g) within limits thereof the powers of the financial control bodies are exercised [1].

The State Financial Inspectorate of Ukraine (SFIU) is the central executive body, thereof activities are directed and coordinated by the Cabinet of Ministers of Ukraine through the Minister of Finance of Ukraine, which is part of the system of executive bodies and ensures the implementation of national policy in the field of public financial control. According to item 1 of Decree of the President of Ukraine No. 499/2011 "On Regulations on the State Financial Inspection of Ukraine" of 23 April 2011 [2], this department replaced the Main Control and Audit Department of Ukraine. A. O. Mukhataiev emphasizes that the reform of the financial control system is not only of important socio-economic significance, but also of a primary importance in the formation of a democratic society. The reform of the system of state financial control began almost simultaneously with the processes of economic transformation, recovery of components of the State system. Nevertheless, such reform may not lead to the desired results, the creation of a holistic system of financial control, due to the fact that in this process

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[1] Pashchenko, O. P. *Legal regulation of the process of financial control (according to the legislation of Ukraine)*. Ph.D.'s thesis. Nat. Acad. of State Tax. Services of Ukraine. Irpen, 2005. 210 p.

[2] Decree of the President of Ukraine on Regulations on the State Financial Inspection of Ukraine No. 499/2011 of 23 April 2011. *Ofitsiinyi visnyk Ukrainy,* no. 2011. No. 31. Art. 1325.

lacks a clear strategy, which should be based on a carefully thought-out concept[1].

The key objectives of the SFI of Ukraine are the implementation of state financial control over: (a) the use and preservation of public financial resources, non-current assets and other assets; (b) the correctness of the determination of the need for budgetary funds and commitments; (c) efficient use of funds and property; (d) the state and reliability of accounting and financial reporting in ministries and other executive bodies, public funds, funds of compulsory state social insurance, budgetary institutions and economic entities of the public economic sector, as well as in enterprises, institutions and organizations that receive (received in the period under review) funds from the budgets of all levels, public funds and funds of compulsory state social insurance or use (used in the period under review) public or municipal property; (e) compliance with the law at all stages of the budget process regarding state and local budgets; (e) compliance with public procurement legislation; (g) the activities of business entities, regardless of the form of ownership, which are not referred by law to the controlled institutions; (h) a court decision rendered in criminal proceedings (Art. 2 of the Law of Ukraine “On Basic Principles of State Financial Control Realization in Ukraine”[2]).

The State Financial Inspection of Ukraine exercises its powers directly and through territorial bodies in the ARC, oblasts, cities of Kyiv and Sevastopol, districts, cities through inter-district, territorial bodies united in districts and cities or through chief inspectors in districts and cities.

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[1] Mukhataiev, A. A. *Legal status and legislative principles of State Financial Inspection in Ukraine*. Ph.D.’s thesis. Yaroslav Mudryi National Law University. Kh., 2005. 194 p.

[2] Law of Ukraine on Basic Principles of State Financial Control Realization in Ukraine No. 2939-XII of 26 January 1993. *Vidomosti Verkhovnoi Rady Ukrainy*. no. 13, 1993. Art. 110.

Officials of the state financial control body are representatives of executive bodies. Their legal requirements are binding on the officials of the objects under control. Interference in the activities of supervisors entails liability provided by law.

According to Art. 7 of the Law of Ukraine "On Prices and Pricing" [1], implementation of state pricing policy, economic analysis of the level and price dynamics, development and submission of proposals for the formation and implementation of national pricing policy carried out by the central executive body applying national pricing policy.

In accordance with para. 1 of the Regulation on the State Inspectorate of Ukraine for Price Control, approved by the Decree of the President of Ukraine No. 236/2012 of March 30, 2012 [2], the DPI is part of the system of executive authorities and implements national policy on price control. The key missions of this public body are:

– (a) implementation of national price control policy through: constant monitoring, analysis and study of price dynamics (tariffs) in the consumer market and prompt provision of the Cabinet of Ministers of Ukraine, public authorities with assessment and analytical materials on expected changes in the price situation in the country; (b) submitting proposals to central and local executive bodies to determine how to impact economic processes and the price situation in the consumer market; (c) provision, in cases specified by law, with conclusions regarding the economic justification of costs during the formation of prices (tariffs) for goods, works and services in respect of which state regulation of prices (tariffs) has been introduced; (d) public control (supervision) over compliance with the requirements

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[1] Law of Ukraine on Prices and Pricing No. 5007-VI of 21 June 2012. *Vidomosti Verkhovnoi Rady Ukrainy*, no. 19–20, 2013. Art. 190.

[2] Decree of the President of Ukraine on Regulation on the State Inspectorate of Ukraine for Price Control No. 236/2012 of March 30, 2012. *Ofitsiinyi visnyk Ukrainy*, no. 26, 2012. Art. 969.

for the formation, establishment and application of state regulated prices; (e) preventing and eliminating pricing breaches;

– making proposals for the formation of a national policy on price control.

In order to optimize the system of central executive bodies and in accordance with para. 9 and 9-1 of Art. 116 of the Constitution of Ukraine, on 10 September 2014, the Cabinet of Ministers of Ukraine decided to liquidate the State Inspectorate for Price Control, entrusting the functions of monitoring the dynamics of prices (tariffs) in the consumer market to the State Statistics Service[1]. Ministries and other central executive bodies were instructed to submit draft government acts on the establishment of commissions to terminate the relevant central executive bodies to the Cabinet of Ministers within a week.

According to Art. 11 of the Law of Ukraine on "State Statistics"[2], state statistical bodies include: the central executive body that implements national policy in the field of statistics and functional state statistical bodies – enterprises, organisations and institutions subordinate to the central executive body that implements national policy in this field. These bodies form a single system of state statistical bodies of Ukraine.

The State Statistics Service of Ukraine is the specially authorised central executive body, thereof activities are directed and coordinated by the Cabinet of Ministers of Ukraine through the Minister of Economic Development and Trade, which implements national policy in the field of statistics (para. 1 of the Regulation on the State Statistics

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[1] Resolution of the CMU on the optimization of the system of central executive bodies No. 442 of 10 September 2014. *Ofitsiinyi visnyk Ukrainy*, no. 74, 2014. Art. 2105.

[2] Law of Ukraine on State Statistics No. 2614-XII of 17 September 1992. *Vidomosti Verkhovnoi Rady Ukrainy*, no. 43, 1992. Art. 608.

Service of Ukraine, approved by Resolution of the Cabinet of Ministers of Ukraine No. 481 of 23 September 2014[1]). The key objectives of State Statistics Service of Ukraine are: implementation of national policy in the field of statistics and submission for consideration of the Minister of Economic Development and Trade of proposals regarding the formation of a national policy in the field.

Therefore, there are no laws and logic in the separation by the legislator of revenue and duties officials, nominated for special ranks, as well as officials of central executive bodies implementing national policy in public financial control and price control, as subjects of dismissal for one-time gross breach of work duties.

Moreover, this step of the legislator seems to have no proper and weighty justification. For example, it is unclear why the subjects, covered by paragraph 1 of Art. 31 the LC of Ukraine, involve officials of the State Financial Inspection of Ukraine, while officials of the State Treasury Service of Ukraine or the State Service of Financial Monitoring of Ukraine are not included in this category. Although, it would seem, the objectives performed by these three public institutions are somehow similar, as well as the powers entrusted to them. In addition, the separation of officials of the central executive body, which implements the national policy in the field of price control, does not correspond to the current situation. After all, on September 10, 2014, in order to optimize the system of central executive bodies and in accordance with paragraphs 9 and 9-1 of Art. 116 of the Constitution of Ukraine, the Cabinet of Ministers of Ukraine decided to liquidate the State Inspectorate for Price Control, entrusting the functions of monitoring the dynamics of prices (tariffs) in the consumer market to the State Statistics Service.

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[1] Resolution of the CMU on approval of Regulation on State Statistics of Ukraine No. 481 of 23 September 2014. *Ofitsiinyi visnyk Ukrainy*, no. 78, 2014. Art. 2237.

Under these circumstances and in view of the experience of foreign countries, it seems prudent to extend the scope of para. 1 of Art. 41 of the LC of Ukraine to officials of the sectors of the economy subject to Statutes on discipline (prosecutor's offices, railways, mining companies, etc.).

It should be noted that the Constitutional Court of Ukraine in the case of legal entities' liability [1] came to the conclusion that in accordance with para. 22 of Part 1 of Art. 92 of the Constitution of Ukraine, only the laws should regulate both the principles of civil, criminal, administrative and disciplinary liability, i.e. acts that are crimes, administrative or disciplinary offenses (the main features of offenses that form their elements), and liability for them. In other words, the elements of any offense, as a basis for bringing a person to legal liability, and actions of public coercion for its commission are determined exclusively by law. In this way, the constitutional justice body forbade regulating these issues by by-laws.

V. O. Holoborodko argues that improvement of the level of protection of employees' rights requires to enshrine in the new Labour Code of Ukraine an exhaustive list of cases whereby labour discipline is regulated exclusively by the Statutes on discipline and proposes to present the relevant article as follows:

"Disciplinary Statutes

1. Disciplinary Statutes regulate labour discipline only of railway transport workers, mining companies, the Prosecutor's Office of Ukraine, the Customs Service of Ukraine, special (militarized) rescue services, civil protection

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[1] Decision of the Constitutional Court of Ukraine in the case on the constitutional appeal of the All-Ukrainian Joint-Stock Bank on the official interpretation of the provisions of paragraph 22 of part one of Article 92 of the Constitution of Ukraine, parts one, three of Article 2, part one of Article 38 of the Code on Administrative Offenses (case on liability of legal entities) No. 7-rp/2001 of 30 May 2001. *Ofitsiinyi visnyk Ukrainy*, no. 24, 2001. Art. 1076.

services, the State Service for Special Communications and Information Protection of Ukraine.

2. Disciplinary Statutes define the duties of managers of enterprises, institutions and organizations to ensure labour discipline, types of incentives and the procedure for their application, types of disciplinary actions and the procedure for their application, the procedure for appealing decisions on the application of disciplinary actions, accounting incentives and disciplinary actions.

3. Disciplinary Statutes are approved by the laws of Ukraine" [1].

Furthermore, the subjects of termination of the employment contract under para. 1 of Art. 41 the LC of Ukraine is the chief accountant of the enterprise, institution, organization and his/her deputy.

The process of identifying, assessing, registering, accumulating, summarizing, storing and transmitting information about the company's activities to external and internal users for decision-making is accounting (Art. 1 of the Law of Ukraine "On Accounting and Financial Reporting in Ukraine" [2]). N. Ya. Dondyk argues that it is a system of continuous, total and interconnected observation and documentary reflection of the creation (and monetary expression) of the product and related processes of exchange, distribution, redistribution" [3]. The purpose of such accounting is provision of users for decision-making with complete, truthful and unbiased information about the financial position, results of operations and cash

[1] Holoborodko, V. O. *Legal regulation of internal labour regulations*. Ph.D.'s thesis. V. Dahl East Ukrainian National Un-ty. Lugansk, 2012. 190 p.

[2] Law of Ukraine on accounting and financial reporting in Ukraine No. 996-XIV of 16 July 1999. *Vidomosti Verkhovnoi Rady Ukrainy*, no. 40, 1999. Art. 365.

[3] Dondyk, N. Ya. *The use of special accounting knowledge in the investigation of economic crimes*. Ph.D.'s thesis. National University of Internal Affairs. – Kh., 2004. 207 p.

flows of the enterprise. Accounting is a mandatory type of bookkeeping by an enterprise. Financial, tax, statistical and other types of reporting that use a monetary measure are based on its data.

Accounting is conducted by each enterprise, regardless of its organizational and legal form and form of ownership according to the uniform state rules. This accounting is used in all sectors and subsectors, in industry, agriculture, construction, etc., in all types of business activities, production, banking, insurance. In each of these fields of activity, in each branch of management it has specific features. For example, at the machine-building plant the subject of accounting is the whole process of manufacture and sale of machinery and equipment, in the construction organization, that is, the process of creation and sale of construction products (finished objects, construction and installation work). However, the initial provisions of accounting are the same, common to all activities and in all sectors of the economy.

At present, special accounting knowledge means not only knowledge of the principles of organization and maintenance of accounting, accounting records, understanding of the economic content of the balance sheet, but also the knowledge necessary for a qualified assessment of the financial condition of the enterprise, prospects for its development and adoption of sound financial, economic and management decisions.

The bearer of special accounting knowledge and the subject of their application is the relevant specialist, that is a person who has received professional training and has the skills to apply such knowledge.

Accounting at the enterprise is conducted continuously from the date of registration of the latter until its liquidation. To ensure accounting, the company independently chooses the forms of its organization: a) the introduction of the position of an accountant in the company's staff or the creation of an

accounting department headed by the chief accountant; b) the use of the services of an accounting specialist registered as an entrepreneur who carries out business activities without creating a legal entity; c) maintenance on a contractual basis of accounting by a centralized accounting firm or audit firm; d) independent accounting and reporting directly by the owner or manager of the enterprise.

In general, we advocate the categorical statement of A. Aivazova, "Probably, no one will dispute the statement that the position of an accountant at the enterprise is the most responsible. And there is no need to explain why"[1]. According to Art. 8 of the Law "On Accounting and Financial Reporting in Ukraine," a chief accountant or a person entrusted with the accounting of the enterprise:

– ensures compliance with the established uniform methodological principles of accounting, preparation and submission of financial statements in a timely manner;

– organizes control over the reflection on the accounts of all business transactions;

– participates in the preparation of materials related to the shortage and reimbursement of losses from shortages, theft and damage to the assets of the enterprise;

– provides verification of the state of accounting in branches, representative offices, offices and other separate divisions of the enterprise;

– submits in the prescribed manner and in cases provided by the Law of Ukraine "On prevention and counteraction to legalization (laundering) of proceeds from crime, financing of terrorism and financing of proliferation of weapons of mass destruction"[2], information to the central executive

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[1] Aivazova, A. Limits of accountant's responsibility: What you need to know. *Advokat bukhgaltera*, no. 21 (123), 2006: 19.

[2] Law of Ukraine on prevention and counteraction to legalization (laundering) of proceeds from crime, financing of terrorism and financing of proliferation of weapons of mass destruction No. 1702-VII of 14 October 2014. *Vidomosti Verkhovnoi Rady Ukrainy*, no. 50-51, 2014. Art. 2057.

body implementing national policy in the field of prevention and counteraction to legalization (laundering) of proceeds from crime, terrorist financing and the financing of the proliferation of weapons of mass destruction.

Missions and functional duties of the accounting service of a budgetary institution, the powers of its head, the chief accountant, and the requirements for his/her professional qualification level are determined by the Standard Regulations on the accounting service of a budgetary institution, approved by Resolution of the Cabinet of Ministers of Ukraine No. 592 of 26 January 2011 [1].

The Qualification characteristics of occupations of workers, approved by Order of the Ministry of Labour and Social Policy of Ukraine No. 336 of 29 December 2004 [2] provides for missions and duties of chief accountants, establishes qualification requirements for them and provides that these qualification characteristics are used as regulations in the development of job descriptions for employees of all positions specified in the staff list of the enterprise and approved by the head of the latter. According to these qualification characteristics, the chief accountant manages the accounting staff of the enterprise, distributes among them job missions and duties, acquaints them with regulatory and methodological documents and information materials related to their activities, as well as with changes in current legislation. Therefore, the position of a chief accountant presupposes the presence of subordinate employees.

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[1] Resolution of the CMU on Standard Regulations on the accounting service of a budgetary institution No. 59 of 26 January 2011. *Ofitsiinyi visnyk Ukrainy*, no. 8, 2011. Art. 372.

[2] Order of the Ministry of Labour and Social Policy of Ukraine on approval of Issue 1 “Occupations of workers that are common to all types of economic activity” of Chapter 3 “Occupations of managers, professionals, specialists and technical employees that are common to all types of economic activities” of Qualification characteristics of occupations of workers No. 336 of 29 December 2004. *Ukr. Invest. Gas*, 45, 2007. Art. 164.

At the same time, according to the National Classifier of Ukraine DK 003:2010 "Classifier of Occupations", approved by Order of State Committee of Ukraine for Technical Regulation and Consumer No. 327 of 28 July 2010[1], the occupational title of the job "Chief Accountant" under the Classifier code (code 1231) belongs to the occupational group "Heads of financial, accounting, economic, legal and administrative divisions and other heads". Therefore, the introduction of the position of a chief accountant in the staff list of the enterprise is possible in case of creating an appropriate structural division. Based on the fact that most enterprises in Ukraine are small, to ensure accounting, they are often limited to the introduction in the staff only an accountant, rather than the creation of an accounting department headed by the chief accountant. Therefore, according to Art. 8 of the Law "On accounting and financial reporting in Ukraine", para. 1 of Art. 41 of the LC of Ukraine should cover not only the chief accountants of enterprises, institutions, organizations, their deputies, but also the persons responsible for accounting of the business entity.

Indirectly current legislation provisions confirm this position, establishing legal liability for wrongdoing by both chief accountants and persons responsible for accounting of the business entity. For example, according to Art. 164-2 of the CAO, concealment in accounting of foreign exchange and other income, unproductive expenses and losses, lack of accounting or keeping it with breach of the established order, entering false data in financial statements, failure to submit financial statements, untimely or poor inventory of cash, pecuniary assets, untimely submission for consideration, consent or approval of the annual financial plan of the public sector of the economy and the report on its implementation,

[1] Classifier of Occupations DK 003: 2010 (approved by Order of the State Committee of Ukraine on tech. regulation and consumption policy No. 327 of 28 July 2010. http://kadry.at.ua/blog/klasifikator_profesij_dk_003_2010/2010–11–08–16.

obstruction the exercise of audits and inspections by employees of the state financial control body, failure to compensate for losses, waste, theft and mismanagement by guilty persons – shall entail the imposition of a fine in the amount of from eight to fifteen times the minimum wage. The same actions committed by a person subject to an administrative penalty for one of the offenses referred to in part one of this article during the year – shall entail the imposition of a fine in the amount of ten to twenty times non-taxable minimum wage. According to Part 3 of Art. 166-6 of the CAO, lack of accounting or its maintenance with breach of the established procedure, untimely, incomplete or with breach of the established procedure of carrying out inventory of property, breach of the procedure of carrying out property assessment, drawing up liquidation balance (intermediate balance), distributive balance, transfer deed at termination of legal persons – shall entail the imposition of a fine on officials of the legal entity, other persons involved in the termination of the legal entity, in the amount of from 100 to 150 times non-taxable minimum wage.

Another and, obviously, the most important entity that can be dismissed for committing one-time gross breach of work duties, is the head of the enterprise, institution, organization of all forms of ownership (suboffice, representative office, branch and other separate division) and his/her deputies.

The successful operation of the enterprise in general, as well as the successful performance of each member of its workforce, requires significant efforts to organize them, to determine the target, coordination of their actions, i.e. requires management. Therefore, management is to some extent an independent activity that involves the ability to influence individual employees and the team in general so that they work towards achieving the goals and objectives

of a particular division or the whole entity for its effective functioning.

In the history of society, discussions about determination of the essence and nature of leadership have been arising. It should be considered that the majority of people are subconsciously convinced that they know how to manage most effectively (even without theoretical knowledge or practical experience), unlike any other activity[1].

The comprehensive social structure has enabled O. M. Okhotnikova to consider the importance of the leader in several gradations of the social dimension at the levels defined by this study, namely the environment:

– macro-social, which involves a set of socio-legal relations between the subjects and objects of the external environment;

– micro-social, which should be considered as a set of socio-legal relations between the subjects of the internal environment;

– meso-social, which should be considered as a set of socio-legal relations between the subjects of the external and internal organizational environment;

– interpersonal environment is a set of socio-legal relations between the subject and the objects of management at the level of personal relations of activity[2].

The scale of the social dimension of the leader's role is differentiated according to the social structure, and mobile, as a mobile social environment whereby the activities of organizations and their employees implement.

Under modern conditions, the key requirement for the head is the ability to overcome challenges emerging in economic practice, contradictions between state and

[1] Ortynskyi, V. L., Kisil, Z. R. Kovaliv, M. V. *Management in the executive authorities of Ukraine*. K.: Tsentr. uchb. lit., 2008. 296 p.

[2] Okhotnikova, O. M. *Administrative liability of the head of a public enterprise, institution, organization in Ukraine*. Ph.D.'s thesis. Nat. Acad. State Tax. Services of Ukraine. Irpen, 2004. 203 p.

collective interests and the ability to reconcile them, adhering to the priority of common human interests in economic issues, where the key form of such activities is a managerial decision, its preparation, adoption and implementation, for which the head should be responsible. The effectiveness of his/her performance is assessed by the indicators as follows: (a) his/her work team productivity, (b) the success of occupational tasks, (c) the psychological climate in the team, (d) employee health and the absence of injury, (e) turnover of personnel, etc.

According to Art. 65 of the Economic Code of Ukraine, management of the enterprise is carried out in compliance with its constituent documents on the basis of a combination of the rights of the owner as to the economic disposal of his/her property and participation of the staff in the management. The owner exercises his/her rights as to enterprise management directly or through authorized bodies in accordance with the enterprise charter or other constituent documents. This authorized body or person can be the directorate, the board, the director, the chairman of the board, or another governing body. In this regard the arguments of B. B. Cherepakhin are worth mentioning. According to him, the concepts of "a body of the legal entity" and "a body of its administration" are by no means identical. The second covers all officials of the body who manage the enterprise as a whole and its individual divisions. The administration consists of the director, his/her deputies and assistants, the chief engineer, heads of workshops, services, productions, farms, etc. These are persons who perform management functions at the enterprise and in its divisions. The governing body of a legal entity, along with the acts of internal management of the enterprise also performs external acts of management of enterprises, institutions, organizations as a legal entity, aimed at establishing, changing and terminating civil

rights and obligations, as well as their implementation and protection[1].

To manage the economic activity of the enterprise, the owner or his/her authorized body appoints a manager. According to the State Classifier of Occupations, the managers can be considered: general director; head, president, other leaders of associations; president of an association, corporation, concern; director of any educational institution, secondary school; director of the plant; chief physician of the treatment and prevention institution, etc.

The current legislation of Ukraine provides for a number of restrictions on the appointment of certain categories of persons to the position of the head of the enterprise. In particular, such restrictions apply to: people's deputies of Ukraine; members of the Cabinet of Ministers of Ukraine; heads of central and other executive bodies; servicemen; notaries; deputies of local councils who work fulltime in these councils; officials of the prosecutor's office, court, state security, internal affairs, public authorities and local governments, except when they perform the functions of management of shares (portions, divvies) owned by the state and represent the interests of the state in the supervisory board or audit company commissions; persons who have been prohibited by the court from engaging in certain activities (if the enterprise carries out this type of activity); persons who have an outstanding criminal record for theft, bribery and other mercenary crimes (Art. 23 of the Law of Ukraine "On Business Associations"[2]); chairmen of the general meeting of participants and members of the audit commission of a limited liability company, who cannot be members of its executive body at the same time (Art. 62 and 63 of the Law of Ukraine "On Business Associations");

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[1] Cherepakhin, B. B. *Proceedings on Civil Law*. M.: Statut, 2001. 479 p.

[2] Law of Ukraine on business associations No. 1576-XII of 19 September 1991. *Vidomosti Verkhovnoi Rady Ukrainy*, no. 49, 1991. Art. 682.

members of the supervisory board and the audit commission of the joint-stock company, who cannot be members of its executive body at the same time (Art. 53 and 58 of the Law of Ukraine “On Joint-Stock Companies” [1]), etc.

In case of hiring the head of the enterprise, an agreement (contract) is concluded with him/her, which determines the term of employment, rights, duties and responsibilities of the head, conditions of his/her renumeration, conditions of dismissal and other conditions of employment upon the approval of the parties. The provisions are detailed in Resolution of the Cabinet of Ministers of Ukraine “On streamlining the contractual form of employment agreement” No. 170 of 19 March 1994 [2]. It should be considered that the procedure for concluding, and terminating employment agreements (contracts) with the heads of state-owned enterprises is regulated by other regulations, in particular, government Resolution “On the application of the contractual form of employment agreement with the head of the state-owned enterprise” No. 203 of 19 March 2005 [3]. The key feature of the contract with the head of the state-owned enterprise is the requirement to agree on its conclusion and termination with the relevant ministry or other executive body.

In general, the issue of appointment, activity and dismissal of the head is complex by its nature. It is due to a dual status of such a position, i.e. a combination of aspects, corporate labour and labour law. According to O. Pavlynska argues, on the one hand, the head, as an employee, is in an employment

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[1] Law of Ukraine on Joint-Stock Companies No.514-VI of 17 September 2008 p. *Vidomosti Verkhovnoi Rady Ukrainy*, no. 50–51, 2008. Art. 384.

[2] Resolution of the CMU on streamlining the contractual form of employment agreement No. 170 of 19 March 1994. *Ukr. Invest. Gas.*, 10, 2003. Art. 174.

[3] Resolution of the CMU on the application of the contractual form of employment agreement with the head of the state-owned enterprise No. 203 of 19 March 2005. *Ukr. Invest. Gas.*, 50, 2007. Art. 203.

relationship with the enterprise, on the other, he/she is appointed by the owner by decision at a general meeting of shareholders or at a meeting of the supervisory board (for joint stock companies), at general meeting of participants (for limited liability companies) or by issuing a decision of the sole owner (for such outdated organizational and legal forms as a private enterprise, etc.). The procedure for the appointment of the head and the procedure for his/her removal from office are regulated by corporate law. However, the employment relationship with the employee requires to be duly completed in view of labour law provisions. In addition, according to labour law, the head is the body authorized by the owner, and therefore in practice he/she represents the latter in relations with the personnel, while entering it as an employee. Obviously, in practice this "duality" of the position raises many questions, especially regarding the design of the relationship in the case where the owner and manager are one and the same [1].

The head of the enterprise acts on behalf of the enterprise without a power of attorney, represents its interests in public authorities and local governments, other organizations, in relations with legal entities and citizens, forms the administration of the enterprise and decides on the latter within the limits and procedure specified by the constituent documents. According to T. A. Zanfirova, the management of the labour process requires effective levers of management to ensure the implementation of managerial decisions, while effective feedback is necessary for the proper functioning of the collective work. Therefore, the employer is endowed with a certain power regarding employees: a) regulatory, that is, the right to establish provisions, binding on employees in their duty status of joint work; b) directive, that is, to give employees mandatory instructions, including on issues not

[1] Pavlynska, O. Appointment of the founder as the head. Labour and law, no. 10(166), 2013: 17.

regulated by legal means; c) disciplinary, that is, to apply the liability actions provided by law to breaches of legal provisions, and employer's instructions issued according to these statutory provisions [1].

An important aspect of the executive body's activity is the existence of mechanisms of responsibility of the director and members of the collegial body. The manager's responsibility is one of the signs of the interdependence of the individual and society. After all, the larger the field of macro-social activity of the leader, the more complex the intertwining of its determinants, the higher the conditions for a correct understanding of the goal and the choice of means to achieve it, i.e. the greater the responsibility of the leader. The head's freedom is inseparable from his/her responsibility, because it is connected with his/her personal values, it is impossible without understanding the purpose, without consistency, which ensures the unity of theory and practice. Freedom to perform managerial activity is the head's ability to act competently to achieve his/her chosen goal, which is realized more fully, the better the knowledge of objective conditions, the more the chosen goal and means to achieve it correspond to objective conditions and natural trends. According to Art. 92 of the CC of Ukraine [2], if members of a legal entity's body and other persons, who in accordance with the constituent documents or the law act on behalf of the legal entity, violate their obligations regarding representation, they shall bear joint responsibility for the losses inflicted thereby to the legal entity. In particular, according to this provision, the body or the person, which in accordance with the legal entity's constituent documents

[1] Zanfirova, T. A. Legal regulation of labor relations with the participation of the employer – an individual. Ph.D.'s thesis. Yaroslav Mudryi National Law University. Kh., 2004. 224 p.

[2] Civil Code of Ukraine (approved by Law of Ukraine No. 435-IV of 16 January 2003). *Vidomosti Verkhovnoi Rady Ukrainy*, no. 40–44, 2003. Art. 356.

or the law acts on its behalf, is obliged to perform fair and reasonable actions in the interests of the legal entity and not to exceed its/his/her powers. Additional disciplinary liability of managers is established in the case of one-time gross breach of work duties.

Moreover, the head not only of the enterprise, but also of its separate division is subject to para. 1 of Art. 41 the LC of Ukraine. The enterprise, while creating a suboffice, representative office, branch, other separate division, agree on their placement with the relevant local governments in the manner prescribed by law. In addition, enterprises have the right to create structural divisions –workshops, sections, teams, offices, laboratories, etc., as well as functional structural divisions of management – departments, offices, departments, offices, services, etc.

According to article 1 of the Law of Ukraine “On state registration of legal entities and individual entrepreneurs” [1], a separate division is a suboffice, another division of a legal entity located elsewhere, manufactures products, performs works or operations, provides services on its behalf, or a representative office, representing and protecting the interests of a legal entity. Such separate divisions are not subject to state registration. Article 95 of the Civil Code of Ukraine defines a suboffice as a separate division of a legal entity situated outside its location, which performs all or part of its functions, and a representative office is a separate division of a legal entity situated outside its location that represents and protects the legal entity’s interests. Neither the suboffice nor the representative office are independent legal entities, but are provided the property of the legal entity, which has created them, and act on the basis of the regulations approved thereby.

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[1] Law of Ukraine on state registration of legal entities and individual entrepreneurs No. 755-IV of 15 May 2003. *Vidomosti Verkhovnoi Rady Ukrainy*, 31-32, 2003. Art. 263.

Therefore, the issue of whether the head of the structural division of a legal entity belongs to the persons with whom the employment contract can be terminated due to one-time gross breach of work duties, requires considering both property and territorial separation of the division headed by this person, as well as the fact that according to Art. 64 of the Economic Code of Ukraine, the enterprise has the right to create suboffice, representative office, branch, other separate division, coordinating issues as to their location with relevant local governments. Provisions of the Civil Code of Ukraine do not prevent legal entities from creating separate divisions not only in other settlements, but also in the same settlement where the legal entity is located. It is only important that this division is property-separated. Such division does not have the legal entity status, and act on the basis of a relevant provision, approved by an enterprise. Accordingly, the persons who head such divisions and perform organizational and administrative functions have the status of the head of a separate division.

It should be noted that, for example, the chief accountant is not only persons who hold the position with the appropriate title, but also those who perform the relevant duties at the time of one-time gross breach and dismissal.

Therefore, para. 1 of Part 1 of Art. 41 the LC of Ukraine should be amended as follows:

"one-time gross breach of employment duties by the head of a legal entity or a separate structural division, his/her deputies, the chief accountant, his/her deputies, officials responsible for accounting, as well as officials covered by the Statutes on discipline."

The results of a comprehensive study in the third subsection of the monograph enable to make conclusions of significant theoretical and applied significance.

1. Therefore, there are no laws and logic in the separation by the legislator of revenue and duties officials, nominated

for special ranks, as well as officials of central executive bodies implementing national policy in public financial control and price control, as subjects of dismissal for one-time gross breach of work duties. Moreover, this step of the legislator seems to have no proper and weighty justification. For example, it is unclear why the subjects, covered by paragraph 1 of Art. 31 the LC of Ukraine, involve officials of the State Financial Inspection of Ukraine, while officials of the State Treasury Service of Ukraine or the State Service of Financial Monitoring of Ukraine are not included in this category. Although, it would seem, the objectives performed by these three public institutions are somehow similar, as well as the powers entrusted to them. In addition, the separation of officials of the central executive body, which implements the national policy in the field of price control, does not correspond to the current situation: after all, on September 10, 2014, in order to optimize the system of central executive bodies and in accordance with paragraphs 9 and 9-1 of Art. 116 of the Constitution of Ukraine, the Cabinet of Ministers of Ukraine decided to liquidate the State Inspectorate for Price Control, entrusting the functions of monitoring the dynamics of prices (tariffs) in the consumer market to the State Statistics Service. Under these circumstances and in view of the experience of foreign countries, it seems prudent to extend the scope of para. 1 of Art. 41 of the LC of Ukraine to officials of the sectors of the economy subject to Statutes on discipline (prosecutor's offices, railways, mining companies, etc.).

It should be noted that the Constitutional Court of Ukraine in the case of legal entities' liability came to the conclusion that in accordance with para. 22 of Part 1 of Art. 92 of the Constitution of Ukraine, only the laws should regulate both the principles of civil, criminal, administrative and disciplinary liability, i.e. acts that are crimes, administrative or disciplinary offenses (that have

main features of offenses, which form their elements), and liability for these offenses.

2. To ensure accounting, the enterprise independently chooses the forms of its organization, including the introduction of the position of an accountant in the company's staff or the creation of an accounting department headed by the chief accountant. According to the Qualification characteristics of occupations of workers, approved by Order of the Ministry of Labour and Social Policy of Ukraine No. 336 of 29 December 2004, a chief accountant manages the accounting staff of the enterprise, distributes among them job missions and duties, acquaints them with regulatory and methodological documents and information materials related to their activities, as well as with changes in current legislation. At the same time, according to the Classifier of Occupations DK 003:2010, approved by Order of State Committee of Ukraine for Technical Regulation and Consumer No. 327 of 28 July 2010, the occupational title of the position "Chief Accountant" under the Classifier code (code 1231) belongs to the occupational group "Heads of financial, accounting, economic, legal and administrative divisions and other heads". Therefore, the introduction of the position of a chief accountant in the staff list of the enterprise is possible in case of creating an appropriate structural division. Based on the fact that most enterprises in Ukraine are small, that to ensure accounting, they are often limited to the introduction in the staff only a position of an accountant, rather than the creation of an accounting department headed by the chief accountant, therefore, according to Art. 8 of the Law "On accounting and financial reporting in Ukraine", para. 1 of Art. 41 of the LC of Ukraine should cover not only the chief accountants of enterprises, institutions, organizations, their deputies, but also the persons responsible for accounting of the business entity.

3. The successful operation of the enterprise in general, as well as the successful performance of each member of its workforce, requires significant efforts to organize them, to determine the target, coordination of their actions, i.e. requires relevant management. The management is to some extent an independent activity that involves the ability to influence individual employees and the team in general so that they work towards achieving the goals and objectives of a particular division or the whole entity for its effective functioning.

Under modern conditions, the key requirement for the head is the ability to overcome challenges emerging in economic practice, contradictions between state and collective interests and the ability to reconcile them, adhering to the priority of common human interests in economic issues, where the key form of such activities is a managerial decision, its preparation, adoption and implementation, for which the head should be responsible. The effectiveness of his/her performance is assessed by the indicators as follows: (a) his/her work team productivity, (b) the success of occupational tasks, (c) the proper psychological climate in the team, (d) employee health in the absence of injury, (e) turnover of personnel, etc.

The issue of whether the head of the structural division of a legal entity belongs to employees with whom the employment contract can be terminated due to one-time gross breach of work duties, requires considering both property and territorial separation of the division headed by him/her, as well as the fact that according to Art. 64 of the Economic Code of Ukraine, the enterprise has the right to create suboffice, representative office, branch, other separate division, coordinating issues as to their location with relevant local governments.

Provisions of the Civil Code of Ukraine do not prevent legal entities from creating separate divisions not only in

other settlements, but also in the same settlement where the legal entity is located. It is only important that this division is property-separated. Such divisions do not have the legal entity status, and act on the basis of a relevant provision, approved by an enterprise. The person who heads such division and performs organizational and administrative functions have the status of “the head of a separate division.

4. The possibility of terminating the employment contract at the initiative of the employer with the head of the legal entity or a separate structural division, his/her deputies, the chief accountant, his/her deputies, officials responsible for accounting, as well as with officials, covered by Statutes on discipline requires legislative consolidation. An approximate version of this provision is formulated.

3.2. The Procedure for Termination of the Employment Contract in case of One-Time Gross Breach of Work Duties

Implementation of social regulation requires certain procedures and relevant provisions. Mandatory procedurality feature is characteristic of the legal regulation system, as it not only ensures the formation of legal requirements, but also determines the formation of their implementation mechanism in society. A well-defined procedural and legal mechanism is an important guarantee against abuse of power. Procedural form is essential not only for the establishment of standards for possible or required conduct, but also for the procedure for performing legally binding acts. Procedurality and standardisation are most fully expressed in legal regulation. In this regard, the procedural and legal mechanism is an integral part, the most important internal mechanism of the legal regulation system.

V. E. Kuznechenkova argues that the legal procedure is a special procedure of legal activity, established by provisions of law, and guarantees compliance of the latter with legal requirements, as well as focuses the legal person on achieving the legal purpose [1]. According to I. M. Zaitsev, the role of legal procedure in the modern state is growing significantly, as the legal regime in it should be determined primarily by the technology of implementation of legal provisions. The most important thing is not to decide what to do, but how to act [2].

K. V. Nikolina reveals the essential features of the legal procedure, namely:

– it is a special type of legal relationship that has a procedural nature and determines the features of legal practice;

– it is holistic, as it consists of certain successive actions of its subjects, as a result of which the corresponding effect is achieved;

– it arises on the basis of provisions of law, i.e. has an official legal nature;

– the legal procedure is implemented in the manner governed by the relevant procedural provisions of law;

– it has its own focus, which is to change the legal reality;

– it is intellectual and volitional, as it depends on the consciousness and will of its subject;

– it determines the sequence in the activities of its subjects;

– the result of the legal procedure is the realization of the rights, freedoms and legitimate interests of a legal person or the performance of legal duties;

– it is manifested in legal activities;

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[1] Kuznechenkova, V. E. Tax law-making process in the system of legal categories. *Zhurn. Ros. Prava*, 1. 2005: 34–37.

[2] Matuzova, N. I., Malko, A. V. (Eds.). *Theory of state and law*. 2nd ed. Moscow: Yurist, 2001. 776 p.

– it is a set of successive acts of conduct, each of them causes the corresponding local results, which affect the content and effectiveness of the entire legal procedure[1]. Therefore, the legal procedure is a special legal phenomenon, an appropriate system aimed at achieving a specific legal effect.

Furthermore, termination of the employment contract at the initiative of the employer in case of one-time gross breach of work duties has its procedure.

Disciplinary proceedings should be recognized as the key component of the latter. In para. 22 of Resolution "On the practice of consideration of labour disputes by courts" No. 9 of 6 November 1992, Plenum of the Supreme Court of Ukraine indicates that in cases of reinstatement of persons dismissed for breach of labour discipline, courts is required to find out what exactly the breach that has led to the dismissal is, whether it could be grounds for termination of the employment contract under para. 1 of Art. 41 of the LC of Ukraine, whether the owner or his/her authorized body complies with the rules and procedures provided for in Articles 147-1, 148 and 149 of this Code for the application of disciplinary actions, in particular, whether the time limit set for this has expired, whether disciplinary action has already been taken during this misdemeanour, whether the gravity of the misdemeanour and the damage caused by it have been taken into account during dismissal, as well as the circumstances under which it was committed, and the employee's previous work. In practice, however, infrequently both employers and courts ignore this guideline.

Now a specific case will be considered. On June 15, 2006, O. filed a lawsuit against the Culture Department of the Executive Committee of the Cherkasy City Council for her

[1] Nikolina, K. V. *Legal procedure: Concepts, features, types, place in the system of legal categories*. Ph.D.'s thesis. Kyiv. University of Law. K., 2011. 215 p.

reinstatement and recovery of average earnings during the forced truancy. By a decision of the Sosnivskyi District Court of Cherkasy of 5 February 2007, upheld by a decision of the Cherkasy Regional Court of Appeal of 6 April 2007, O.'s suit was dismissed.

However, the panel of judges of the Judicial Chamber for Civil Cases of the Supreme Court of Ukraine takes the position that O.'s cassation appeal is subject to partial satisfaction. The courts found that O. worked as a deputy director for educational work at Cherkasy Children's Music School No. 1, and Order of the Department of Culture of the Executive Committee of the Cherkasy City Council No. 9-k of 5 June 2006 dismissed the plaintiff from office according to para. 1 of Art. 41 of the LC of Ukraine and transferred to the position of a teacher of music theory. The grounds for dismissal were the letter of the State Audit Service of Ukraine in Cherkasy region No. 23-03/31-1586 of 31 March 2006, and a letter from the director of Cherkasy Children's Music School No. 1 of 29 May 2006, no. 70/3. By Order of the Culture Department of the Executive Committee of the Cherkasy City Council No. 12-k of 26 June 2006, Order No. 9-k was amended. The plaintiff was dismissed from the position of Deputy Director on the grounds of one-time gross breach of labour discipline (inaccuracy of data in the primary accounting documents that led to unlawful labour costs of teacher P. (SASU act No. 01-45/017 of 6 March 2006, letter of the SASU of Ukraine No. 23-03/31 of 31 March 2006). In proceeding, the courts considered the fact that according to the audit certificate of the control and audit department in Cherkasy of 6 March 2006, No. 01–45/017, plaintiff O., whose duties included drawing up a payroll for teachers, committed one-time gross breach of labour discipline, that is, showed negligence, did not check the accuracy of the data, which led to unlawful labour costs of teacher P. for October 2004. Moreover, the courts did not establish at

all when the plaintiff committed actions that were one-time gross breach of labour discipline, and whether the defendant complied with the 6-month period provided for in Part 2 of Art. 148 of the LC of Ukraine, when imposed on O. a disciplinary action in the form of dismissal [1].

Termination of the employment contract in case of one-time gross breach of work duties should be clearly distinguished from termination of the employment contract with the head at the request of the elected body of the primary trade union organization (trade union representative).

According to part 1 of Art. 45 of the LC of Ukraine, at the request of the elected body of the primary trade union organization (trade union representative) the owner or his/her authorized body is required to terminate the employment contract with the head of the enterprise, institution or organization, if he/she breaches laws on labour, collective agreements and contracts, Law of Ukraine "On trade unions, their rights and guarantees of activity" [2]. It should be noted that such dismissal requirements apply only to heads and should not apply to his/her deputies, heads of structural divisions and their deputies.

O. A. Yakovliev argues, "This is due to the fact that in modern conditions, all these people are employees. They are hired and dismissed by the head of the enterprise, institution, organization. Although deputy heads, chief specialists, and heads of structural divisions are included in the management structure, they differ little in their legal status from other employees" [3].

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[1] On reinstatement and recovery of average earnings during forced truancy (case no. 6-12596sv07). http://reyestr.court.gov.ua/.

[2] Law of Ukraine on trade unions, their rights and guarantees of activity No. 1045-XIV of 15 September 1999. *Vidomosti Verkhovnoi Rady Ukrainy*, no. 45, 1999. Art. 397.

[3] Yakovlev, O. A. *Termination of the employment contract on the initiative of third parties who are not parties to the employment contract*. Ph.D.'s thesis. Yaroslav Mudryi National Law University. Kh., 2003. 189 p.

In this case, the head of a legal entity breaches laws on labour, collective agreements and contracts. These breaches concern the rights and guarantees of all or most employees in the enterprise, institution or organization, destroying the normal social relations between the head and employees. The dismissal of one person – the head – provides for the rights and guarantees of all employees.

According to O. H. Sereda, dismissal of the head of an enterprise, institution or organization at the request of trade unions should not be considered a disciplinary action[1]. It is worth agreeing with the position of the scientist. According to this article, dismissal is not a disciplinary action and is not related to compliance with the deadlines and procedures provided for in Art. 148 and 149 of the LC of Ukraine. In other words, a trade union that requires termination of the employment contract with a head is not required to keep within one-month term from the discovery of a misdemeanour by the manager and six-month term from the date of the offense. Moreover, this conclusion is the only correct because the head of the enterprise, institution or organization is not subordinated to trade unions, and trade unions are not endowed with the right to apply disciplinary actions to the head and other employees.

According to Part 1 of Art. 45 of the LC of Ukraine, the request of the elected body of the primary trade union organization (trade union representative) is mandatory not only for consideration but also for execution. If the employer or his/her authorized body or the head, in respect of whom termination of the employment contract is requested, does not agree, he can appeal the decision of the trade union body to the court within two weeks from the date of receipt of the decision. In this case, the fulfilment of the request for termination of the employment contract is

[1] Sereda, O. Duties of employer legal effects of their ignorance. *Law of Ukraine*, no. 9, 2002: 83-84.

suspended until the court makes a decision. If the decision of the trade union body is not executed and is not appealed within the specified period, the trade union body can within the same period appeal to the court against the actions or inactivity of officials or bodies responsible for terminating the employment contract with the head of the enterprise, institution or organization.

Therefore, the main differences between termination of the employment contract in the cases provided for in para. 1 of Part 1 of Art. 41 of the LC and Art. 45 of the LC are as follows:

a) the former occurs at the initiative of the employer, while the initiator of the latter is the elected body of the primary trade union organization (trade union representative);

b) the first is the ground for dismissal of the head of the enterprise or a separate division, his/her deputies, the chief accountant of the enterprise, his/her deputies, as well as officials of the revenue and duties bodies nominated for special ranks, and officials of central executive bodies implementing national policy in public financial control and price control, and the second – only of the head of the legal entity;

c) the grounds for termination of the employment contract in the first case are one-time gross breach of work duties, in the second – breach of laws on labour, collective agreements and contracts, the Law of Ukraine “On trade unions, their rights and guarantees of activity”. In the second case, breaches concern labour rights and guarantees of their provision for all or most employees of the enterprise;

d) dismissal on the first ground is a disciplinary action, and on the second, it is not such an action;

e) in the first situation, dismissal is the right of the employer, who may not use it, in the second, the latter is obliged to terminate the employment contract. As mentioned above, dismissal in case of employee’s one-time gross breach

of work duties is a type of disciplinary action that can be imposed on that person by the employer. According to Art. 147-1 of the LC Ukraine, disciplinary actions are applied by the body empowered with the right to employ persons (elect, approve and appoint). Moreover, the next higher authority can impose disciplinary actions on employees, subject to disciplinary liability under the Statutes, regulations and other acts of disciplinary legislation. Employees holding elected positions can be dismissed only by a decision of the body that elected them, and only on the grounds provided by law. The importance of taking into account these legal requirements is illustrated by an example from case law.

On May 2010, V. filed a lawsuit against the Housing and Communal Services Department 'Alternatyva' of the Volodymyr Village Council of the Zaporizhzhia District of the Zaporizhzhia Region to reinstate, recover the average wage during the forced truancy, and non-pecuniary damage. The decision of the Zaporizhzhia District Court of the Zaporizhzhia Region of 3 February 2011, upheld by the decision of the Court of Appeal of the Zaporizhzhia Region of 4 May 2011, dismissed the claim.

The panel of judges of the High Specialized Court of Ukraine for Civil and Criminal Cases concluded that V.'s cassation appeal was subject to partial satisfaction. It was established that since 15 March 2007 the parties had been in an employment relationship and the plaintiff worked as the director of HCSD 'Alternatyva' in accordance with the decision of Volodymyr Village Council No. 61 of 15 March 2007. According to Ordinance No. 8 of 23 April 2010 of the Volodymyr Village Council, V. was dismissed from his post in connection with the breach of financial discipline in the performance of his work duties. According to Art. 42 of the Law "On local self-government in Ukraine"[1], in case

[1] Law of Ukraine on local self-government in Ukraine No. 280/97-BP of 21 May 1997. *Vidomosti Verkhovnoi Rady Ukrainy*, 24, 1997. Art. 170.

of dismissal of the village, settlement chief, city mayor, his/her authorities are exercised by the secretary of the relevant council. Ordinance on dismissal of the plaintiff is signed by acting village chief H. Elements of the claim of V. on his dismissal by an unauthorized person were duly checked by neither the court of first instance nor the appellate court, nor was it clarified why the issue had not been resolved by the secretary, what authorities were delegated to the acting village head G. in the absence of the head of the Volodymyr Village Council. Regarding breach of the above requirements of the law, the courts did not properly verify compliance with the procedure for imposing a disciplinary action on the plaintiff under Art. 149 of the LC of Ukraine, as well as the gravity of his guilt and his elements of the claim regarding the unlawfulness of the dismissal, and did not provide facts that would refute such elements [1].

V. S. Kovryhin argues that in order to improve the law application practice, a provision, according to which the employer has the right to transfer the authority regarding disciplinary actions to one of his/her deputies or the head of a separate structural division of the legal entity, requires to be legislated. According to the scientist, such an order should state the reason for the transfer of this right to another official, clearly define the scope of its authorities and the term of their transfer [2].

The law application authority can find breach of work duties gross, based on the nature of a misdemeanour, circumstances whereby it was committed, the damage caused or could have been caused by the employee. This is one-time, not ongoing breach of work duties, which may entail the application of disciplinary actions on other grounds. In

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[1] On reinstatement and recovery of average earnings during forced truancy (case no. 6–22208sv11). http://reyestr.court.gov.ua/.

[2] Kovryhin, V. S. *Disciplinary liability in Labor Law*. Ph.D.'s thesis. T. Shevchenko Kyiv National University. K., 2012. 221 p.

other words, if breach is long-term (for example, weakening or lack of control over the work of subordinates), and is not one-time, the dismissal under para. 1 of Art. 41 of the LC of Ukraine is impossible.

According to Art. 148 of the LC of Ukraine, disciplinary action is applied by the owner or his/her authorized body immediately after the misdemeanour, but not later than one month from the date of its discovery, without taking into account the time of dismissal of the employee from work due to temporary incapacity or leave. Furthermore, it cannot be imposed after 6 months from the date of the offense.

According to the requirements of Art. 149 of this Code, before making a decision on dismissal of the head for one-time gross breach of work duties, he/she is required to provide written explanations. The purpose of obtaining them by the employer is to find out the circumstances wherein the misdemeanour has been committed to take this into account along with other circumstances, when choosing the type of action. The fact that the owner or his/her authorized body did not receive such explanations due to the lack of data on the seriousness of the reasons for the breach cannot be grounds for declaring the decision to apply a disciplinary action unlawful.

It is not possible to dismiss for breach that has already entailed another type of disciplinary actions. However, when an employee causes property damage, a combination of disciplinary and pecuniary liability is possible, as these actions have different purposes.

According to E. Antsut, dismissal of an employee under para. 1 of Part 1 of Art. 41 of the LC of Ukraine requires indication, in the decision, order (ordinance) of the competent authority or owner, both the factual and legal grounds for dismissal for breach, as well as the provision of the LC[1].

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[1] Antsut, E. Dismissal of the head for one-time gross breach work duties. *Pratsya i Zakon*, 3 (159), 2013: 20.

According to Art. 43-1 of the LC of Ukraine, termination of an employment contract at the initiative of the owner or his/her authorized body in case of one-time gross breach of labour duties is allowed without the consent of the elected body of the primary trade union organization (trade union representative).

The requirement that dismissal occurs, if it is impossible to transfer the employee to another job with his/her consent, does not apply to the specified grounds for termination of employment. The requirement of part 3 of Art. 40 of this Code, which does not allow a dismissal of the employee during his/her temporary incapacity for work, or on leave, applies to the considered ground of termination of the employment contract. Therefore, considering the specificity of the legal status of persons who may be dismissed under para. 1 of Part 1 of Art. 41 of the LC of Ukraine, the list of periods when employees cannot be dismissed should be expanded providing that disciplinary action in the form of dismissal does not apply: a) in case of absence of the employee at work due to temporary incapacity for work; b) during the stay of employees on leave or business trip; c) during an official investigation.

Severance pay is not paid to employees dismissed for one-time gross breach of work duties.

The results of a comprehensive study in this sub-section of the monograph enable to make conclusions of significant theoretical and applied significance.

1. One-time gross breach of work duties is a type of breach of labour discipline by an employee, therefore, the law application body should establish more specifically what this breach was, whether it could be grounds for termination of the employment contract under para. 1 of Art. 41 of the LC of Ukraine and which legal requirements regarding timing and procedure for applying disciplinary actions should be observed.

2. The law application body can find breach of work duties gross, based on the nature of a misdemeanour, circumstances whereby it was committed, the damage caused or could have been caused by the employee. Moreover, this should be one-time, not ongoing breach of work duties, which may entail the application of disciplinary actions on other grounds. In other words, if breach is long-term (for example, weakening or lack of control over the work of subordinates), and is not one-time, the dismissal under para. 1 of Art. 41 of the LC of Ukraine is impossible.

3. The list of periods when employees cannot be dismissed should be expanded providing that corresponding disciplinary action does not apply: a) in case of absence of the employee at work due to temporary incapacity for work; b) during the stay of employees on leave or business trip; c) during an official investigation.

4. Termination of the employment contract in case of one-time gross breach of work duties should be clearly distinguished from termination of the employment contract with the head at the request of the elected body of the primary trade union organization (trade union representative). The key differences between termination of the employment contract in the cases provided for in para. 1 of Part 1 of Art. 41 of the LC and Art. 45 of the LC are as follows:

a) the former occurs at the initiative of the employer, while the initiator of the latter is the elected body of the primary trade union organization (trade union representative);

b) the first is the ground for dismissal of the head of the enterprise or a separate division, his/her deputies, the chief accountant of the enterprise, his/her deputies, as well as officials of the revenue and duties bodies nominated for special ranks, and officials of central executive bodies implementing national policy in public financial control and price control, and the second – only of the head of the legal entity;

c) the ground for termination of the employment contract in the first case is one-time gross breach of work duties, in the second – breach of laws on labour, collective agreements and contracts, the Law of Ukraine "On trade unions, their rights and guarantees of activity". In the second case, breaches concern labour rights and guarantees of their provision for all or most employees of the enterprise;

d) dismissal on the first ground is a disciplinary action, and on the second, it is not such an action;

e) in the first situation, dismissal is the right of the employer, who may not use it, in the second, the latter is obliged to terminate the employment contract.

Conclusions to Chapter 3

The study of the current state of affairs in legal regulation of termination of the employment contract in case of one-time gross breach of work duties enabled to make certain scientific and theoretical conclusions and formulate author's proposals regarding improvement of this procedure.

1. Therefore, there are no laws and logic in the separation by the legislator of revenue and duties officials, nominated for special ranks, as well as officials of central executive bodies implementing national policy in public financial control and price control, as subjects of dismissal for one-time gross breach of work duties. Moreover, this step of the legislator seems to have no proper and weighty justification. For example, it is unclear why the subjects, covered by paragraph 1 of Art. 31 the LC of Ukraine, involve officials of the State Financial Inspection of Ukraine, while officials of the State Treasury Service of Ukraine or the State Service of Financial Monitoring of Ukraine are not included in this category. Although, it would seem, the objectives performed by these three public institutions are somehow

similar, as well as the powers entrusted to them. In addition, the separation of officials of the central executive body, which implements the national policy in the field of price control, does not correspond to the current situation, after all, on September 10, 2014, in order to optimize the system of central executive bodies and in accordance with paragraphs 9 and 9-1 of Art. 116 of the Constitution of Ukraine, the Cabinet of Ministers of Ukraine decided to liquidate the State Inspectorate for Price Control, entrusting the functions of monitoring the dynamics of prices (tariffs) in the consumer market to the State Statistics Service. Under these circumstances and in view of the experience of foreign countries, it seems prudent to extend the scope of para. 1 of Art. 41 of the LC of Ukraine to officials of the sectors of the economy subject to Statutes on discipline (prosecutor's offices, railways, mining companies, etc.).

Moreover, it should be noted that the Constitutional Court of Ukraine in the case of legal entities' liability came to the conclusion that in accordance with para. 22 of Part 1 of Art. 92 of the Constitution of Ukraine, only the laws should regulate both the principles of civil, criminal, administrative and disciplinary liability, i.e. acts that are crimes, administrative or disciplinary offenses (that have main features of offenses, which form their elements), and liability for these offenses.

2. To ensure accounting, the enterprise independently chooses the forms of its organization, including the introduction of the position of an accountant in the company's staff or the creation of an accounting department headed by the chief accountant. According to the Qualification characteristics of occupations of workers, approved by Order of the Ministry of Labour and Social Policy of Ukraine No. 336 of 29 December 2004, a chief accountant manages the accounting staff of the enterprise, distributes among them job missions and duties, acquaints them with regulatory and methodological documents and information

materials related to their activities, as well as with changes in current legislation. At the same time, according to the Classifier of Occupations DK 003:2010, approved by Order of State Committee of Ukraine for Technical Regulation and Consumer No. 327 of 28 July 2010, the occupational title of the position “Chief Accountant” under the Classifier code (code 1231) belongs to the occupational group “Heads of financial, accounting, economic, legal and administrative divisions and other heads”. Therefore, the introduction of the position of a chief accountant in the staff list of the enterprise is possible in case of creating an appropriate structural division. Based on the fact that most enterprises in Ukraine are small, that to ensure accounting, they are often limited to the introduction in the staff only a position of an accountant, rather than the creation of an accounting department headed by the chief accountant, therefore, according to Art. 8 of the Law “On accounting and financial reporting in Ukraine”, para. 1 of Art. 41 of the LC of Ukraine should cover not only the chief accountants of enterprises, institutions, organizations, their deputies, but also the persons responsible for accounting of the business entity.

3. The successful operation of the enterprise in general, as well as the successful performance of each member of its workforce, requires significant efforts to organize them, to determine the target, coordination of their actions, i.e. requires relevant management. The management is to some extent an independent activity that involves the ability to influence individual employees and the team in general so that they work towards achieving the goals and objectives of a particular division or the whole entity for its effective functioning.

Under modern conditions, the key requirement for the head is the ability to overcome challenges emerging in economic practice, contradictions between state and collective interests and the ability to reconcile them, adhering

to the priority of common human interests in economic issues, where the key form of such activities is a managerial decision, its preparation, adoption and implementation, for which the head should be responsible. The effectiveness of his/her performance is assessed by the indicators as follows: (a) his/her work team productivity, (b) the success of occupational tasks, (c) the proper psychological climate in the team, (d) employee health in the absence of injury, (e) turnover of personnel, etc.

The issue of whether the head of the structural division of a legal entity belongs to employees with whom the employment contract can be terminated due to one-time gross breach of work duties, requires considering both property and territorial separation of the division headed by him/her, as well as the fact that according to Art. 64 of the Economic Code of Ukraine, the enterprise has the right to create suboffice, representative office, branch, other separate division, coordinating issues as to their location with relevant local governments. Provisions of the Civil Code of Ukraine do not prevent legal entities from creating separate divisions not only in other settlements, but also in the same settlement where the legal entity is located. It is only important that this division is property-separated. Such divisions do not have the legal entity status, and act on the basis of a relevant provision, approved by an enterprise. The person who heads such division and performs organizational and administrative functions have the status of "the head of a separate division."

4. The possibility of terminating the employment contract at the initiative of the employer with the head of the legal entity or a separate structural division, his/her deputies, the chief accountant, his/her deputies, officials responsible for accounting, as well as with officials, covered by Statutes on discipline requires legislative consolidation. An approximate version of this provision is formulated.

5. One-time gross breach of work duties is a type of breach of labour discipline by an employee, therefore, the law application body should establish more specifically what this breach was, whether it could be grounds for termination of the employment contract under para. 1 of Art. 41 of the LC of Ukraine and which legal requirements regarding timing and procedure for applying disciplinary actions should be observed.

6. The law application body can find breach of work duties gross, based on the nature of a misdemeanour, circumstances whereby it was committed, the damage caused or could have been caused by the employee. Moreover, this should be one-time, not ongoing breach of work duties, which may entail the application of disciplinary actions on other grounds. In other words, if breach is long-term (for example, weakening or lack of control over the work of subordinates), and is not one-time, the dismissal under para. 1 of Art. 41 of the LC of Ukraine is impossible.

7. The list of periods when employees cannot be dismissed should be expanded providing that corresponding disciplinary action does not apply: a) in case of absence of the employee at work due to temporary incapacity for work; b) during the stay of employees on leave or business trip; c) during an official investigation.

8. Termination of the employment contract in case of one-time gross breach of work duties should be clearly distinguished from termination of the employment contract with the head at the request of the elected body of the primary trade union organization (trade union representative). The key differences between termination of the employment contract in the cases provided for in para. 1 of Part 1 of Art. 41 of the LC and Art. 45 of the LC are as follows:

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