UDC 349.2

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UK AND US – LABOUR DISPUTE RESOLUTION PROCEDURES: PROS ET CONS

In this paper scientific investigation of the advantages and disadvantages of judicial and effectiveness of applying alternative (administrative, procedural) labour dispute resolution systems is provided. Knowledge and information obtained from an international study and has on target to show, what correlation between procedural and processual ways of labour dispute resolution with their effectiveness taking in account. Research of the foreign procedures labour disputes prevention and resolution, make from their features, compare it between one another, as well as giving recommendations to improve this ones from the positions of procedural dualism of labour disputes resolution ways is provided.

Key words: *judicial labour dispute resolution system, alternative (administrative, procedural) labour dispute resolution system, procedural and processual ways of labour dispute resolution, effectiveness of labour dispute resolution system, labour disputes prevention and resolution.*

Introduction and aims. Scientific investigation of the advantages or disadvantages of judicial and effectiveness of applying alternative (administrative, procedural) labour dispute resolution systems related with the current review of employment dispute resolution in foreign countries, particularly as United Kingdom of Great Britain and USA, closely. This paper draws on knowledge and information obtained from an international study and has on ***target*** to show, what correlation between **procedural** and **processual** ways of labour dispute resolution with their effectiveness taking in account.

Works of such authors as: V. Gernakov, I. Kiselev, A. Matsko, S. Prilipko, A. Slusar, G. Chanisheva, and others were devoted for someone aspects of this article, particularly: for questions of existing someone procedures in labour law and its peculiarities in Ukraine and aboard.

At same time, the question about influence of effectiveness of processual ways of labour dispute resolution on procedural ones has been already unsolved.

Thus, the **purposes of the article** are consist in research of the foreign procedures labour disputes prevention and resolution, make from their features, compare it between one another, as well as giving recommendations to improve this ones from the positions of procedural dualism of labour disputes resolution ways.

Statement. As provides D. Esplin et al. (Esplin, 2007) [1, p. 4–17], the current employment dispute system in the UK is closely aligned with the creation of the Industrial Tribunal system and the statutory right to claim unfair dismissal introduced in the Industrial Relations Act 1971. The 1971 legislation flowed from the recommendations of the "Donovan Commission" set up to review the state of employment relations. Although primarily focused on collective bargaining and the part played by trade unions, Donovan's concept of a Labour Tribunals system

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was one which was a type of people's court, easily accessible, speedy, informal and inexpensive dispute resolution mechanism. In reality, Employment Tribunals (as they are now called) are specialist courts with a legally qualified Chair. Even the greatest supporter of the employment Tribunal system would probably concede that Employment Tribunals are now very far removed from any notion of a "people's court". The Tribunals of today deal with increasingly complex and expensive litigation. In 1975, the Advisory Conciliation and Arbitration Service (ACAS) were set up as an independent, impartial body and now have a statutory duty to promote and undertake conciliation in individual rights cases. It does not, however, have powers to force parties to conciliate or mediate. ACAS is able to perform an effective role in helping to achieve conciliated settlements and has powers to ensure these are legally binding on both parties. For example in 2004/2005 ACAS claims to have settled 86,816% actual or potential tribunal applications. This accounts for 73% of potential tribunal hearing days, 48% through cases settled directly under ACAS and a further 25% through influencing the parties (Gibbons, 2007). The last two decades have seen a significant rise in the number of applications and tribunal costs. There are many complicating factors, which have led to this. For example, the growth of domestic employment legislation individual rights and the diminution in collective bargaining with trade union membership now less than 20% in the private sector. Perhaps most significant has been the influence and impact of European laws over the last two decades. The costs to government for Tribunal funding and ACAS in 2005/2006 was 120 million pounds (Gibbons, 2007). In October 2004 the UK Government implemented new dispute resolution regulations namely the Dispute Resolution Regulations 2002 (DRR, 2002). These regulations were designed to filter out ineligible claims, including those that have not been dealt with through statutory discipline, dismissal and grievance procedures. This required employers to adopt a simple three-step process with each claim having its own statutory time line to ensure full compliance. The net effect of the new system is that employees who wish to undertake Employment Tribunal cases must exhaust statutory grievance or disciplinary procedures in respect of most but not all employing rights before a legal claim can proceed. Critics argue that the new regulations have lead to a defensive adherence to process focused on the protection of legal positions rather than a creative approach to problem solving. According to Gibbons current opinion from both employers and small business organisations indicate a serious flaw in the DRR 2002 Regulations and conclude that the actual effect of the regulations has been to make everyone focus on process resulting in a draconian and bureaucratic system (Gibbons, 2007). The report's key recommendations are as follows: ensure employment tribunals at their discretion take into account reasonableness of behaviour and procedure when making awards introduce a new simple process to settle monetary disputes without the need for tribunal hearings increase the quality of advice to potential claimants and respondents through an adequately resourced help line and the internet and offer free early dispute resolution service, including where appropriate mediation. Repeal the statutory dispute resolution procedures set out in the Dispute Resolution Regulations Produce clear, simple, non-prescriptive guidelines on grievances, discipline and dismissal in the workplace. Challenge all employer and employee organisations to commit to implementing and promoting early dispute resolution, e. g. through greater use of in-house mediation early neutral evaluation and provisions in contracts of employment. Encourage employment tribunals to engage in active, early case management and consistency of practice in order to maximise efficiency and direction throughout the system and to increase user confidence in it. Simplify employment law, recognising that its complexity creates uncertainty and costs for employers and employees (Gibbons, 2007).

So, in UK the Employment Tribunals deal with increasingly complex and expensive litigation, which provokes creation alternative procedural ways of labour disputes resolution.

At same time[1], the ***USA*** has long history of applying mediation techniques in the resolution of employment disputes principally through the services provided by the ***Federal Mediation and Conciliation Service***. In more recent times there has been a growing trend towards organisationally based dispute resolution systems through the use of ADR methods and ombudsman structures. Both of these systems were examined in the study.

The FMCS was set up by President Roosevelt in 1935 against a background of Roosevelt's new deal for unions and the subsequent 1935 National Labour Relations Act, which gave employees a federally protected right to organise and bargain collectively. The FMCS has grown from a body charged with assisting parties in conflict to an organisation positioned to provide a range of conflict resolution functions such as mediation, dispute system design and training and development. According to Flax FCMS Commissioners are currently charged with a range of responsibilities including capacity building within organisations combined with the use and application of a wide breadth of differing mediation techniques in what remains of the US organised labour market, mainly in the field of transport, car manufacturing and health care. This currently accounts for about 12% of the US workforce (Flax, 2007). In 2005 the FCMS were involved in 6,640 disputes with a success rate of 75%. Only 1.5% of cases resulted in work stoppages (FMCS, 2007). Mediators are available to all companies with collective bargaining agreements. The FMCS role is clearly effective and important in many vital areas of the US labour market however the diminution of organised labour in the USA has created a significant workplace transformation including the adoption of new human resource management techniques, which continue to create new challenges within organisational structures. There has also been a significant growth in the introduction of major statutes regulating employment conditions which have generated new areas of litigation. An estimated 30 million civil cases, currently registered in federal, state and local courts, provide a clear indication of the importance of devising effective forms of conflict management. In the year 2000 one in nine cases involving employment discrimination disputes received a median award of $ 1,000,000 or more (SPIDR, 2006). As a consequence many large organisations, institutions and corporations are looking at new and innovative conflict management system methods and design.

The Ombudsman Role. Unlike the UK system of ombudsman, which is mainly external to organisations, the US model is that of an internal ombudsman who is typically a neutral or impartial manager within an organisation, who can provide informal and confidential assistance to managers and employees in resolving work-related concerns. This form of internal ombudsman is able to apply a wide range of skills to achieve problem resolution, including counselling, mediation, facilitation and acts as an informal fact finder, upward feedback and change agent. Over the past thirty years hundreds of North American corporations have established organisational ombudsman offices to help manage and resolve workplace related conflict. One of the most influential and early forms of this type of system stemmed from the Ombudsman function established over thirty years ago at the Massachusetts Institute of Technology (MIT) by Professor Mary Rowe who still remains the MIT Ombudsperson. According to Rowe the effectiveness of the ombudsman role is drawn from a range of dynamics which, when combined, create the right climate within which an ombudsman can function effectively. The following are some key standards:

– confidentiality of the office and system;

– neutrality of the ombudsman Relationships;

– trust and confidence Ease and safety of accessibility;

– moral authority Reputation for fairness Delivering respect Listening and counselling Providing and receiving information Creative problem solving Facilitating change (Rowe, 2003).

Attempts to measure the cost effectiveness of the organisational ombudsman function was undertaken in the late 1980's using as a basic cost effectiveness equation

[1] See previous note.

of: Value added + cost control-ombudsman mistakes costs of ombudsman function. In assessing the value of the ombudsman function five benefits were ascribed to the equation namely productivity, management time, other personnel savings, legal staff salary savings and other agency and law-related savings. Applying this formula to MIT in the late 1980's (adjusted to factor in some research funding) the estimated value was three times the ombudsman's office cost (i. e. US $600,000) representing a significant saving in litigation costs, staff time and future conflict avoidance through mediation, training and capacity building within the Institution (Rowe and Perneski, 1990). Further research on the effectiveness of the organisational Ombudsman/Mediator program at the National Naval Medical Centre (200 + bed hospital with 600 physicians) revealed that, between July 2001 and July 2003, 200 cases were directed to the Ombudsman without a single payment or the filing of a legal claim. The national average is 10 to 12 patient complaint episodes in every 100 ends in litigation with the average cost of 12 claims being $ 4,800,000. This research also revealed an increase in patient and family satisfaction, a reduction in legal costs, a reduction in claims and evidence of improved patient safety (Houk, 2003). The Ombudsman role has continued to develop throughout North America. More contemporaneous concepts use terms such as integrated conflict management design system to offers a more advanced structure which has multiple access points within organisations with fully trained mediators and sophisticated early warning systems focussed on conflict avoidance. This model, known as the "Lynch ICMS Model", appears to be at the cutting edge of the "beyond ADR" debate. It is regarded as simple effective method which has significantly transformed many public sector organizations across North America. These include the Transportation Security Administration of the United States Department of Homeland Security, the World Bank, Department of National Defence and Canadian Forces, Parks Canada, Public Works and Government Services Canada, the RCMP, Canada Customs and Revenue Agency, and the work of the Privy Council of Canada's Task Force on Modernization of Human Resources within the Public Service. Key ingredients of the system include: encourages employees and managers to give early indication of their concerns and constructive dissent. Integrates a collaborative problem-solving approach into the culture of the organisation is flexible and user friendly. Provides options for all types of problems and all people in the workplace including employers, supervisors, professionals, and managers. Creates a culture that welcomes dissent and encourages resolution of conflict at the lowest level through direct negotiation.

Provides multiple access points. Employees can readily identify and access a knowledgeable person whom they can trust for advice about the conflict management system. Crucial to this success is the willingness of organisations to recognise the importance of developing an effective conflict management system that is fit for purpose and an acceptance that this can only be achieved by engaging and securing input from the users and decision makers at all levels of the organisation (Lynch in SPIDR). For improvement of UK – labour disputes resolution **procedure**, Esplin provides following[2]: "What does the USA experience have to offer Great Britain? Mediation as an effective conflict management tool is well established and embedded in to the US system of industrial relations. However, as discussed the role of the FCMS is limited in terms of the changes in organised labour in the USA. Nevertheless the use and application of mediation as part of a government funded services is a concept which could be applied to the UK in terms of an expanded and enhanced role for ACAS. Of equal importance and arguably of greater interest to the UK should be the innovative and effective methods of organisational conflict management prevalent throughout North America. The current UK Gibbons review specifically recommends that: The Government should challenge all employer and employee organisations to commit to implementing and promoting early dispute resolution, e. g. through greater use of in-house mediation, early neutral evaluation and provisions in contracts of employment

[2] From the same resource.

(Gibbons, 2007) Both the Ombudsman and ICMS system of conflict management have a great deal to offer UK employer organisations. The introduction of in-house mediation as recommended by Gibbons is laudable but to build effective capacity within organisations greater attention will need to be paid to creating suitable structures, both contractual and organisational, that will actively promote and encourage the use of in house mediation methods. The success and effectiveness of the USA organisational Ombudsman model is built around the neutrality and independence of the role and (as in the more developed ICMS model) an organisational culture characterised by collaborative problem solving and a defence of the principles of free speech and dissent. In terms of UK traditional management structures some of the Gibbon's recommendations if implemented, will require a significant cultural shift to achieve this. UK organisations willing to embrace this change could derive great benefit from the systems and methods currently in use in the USA".

Comparative analysis between UK and US procedures leads to following:

– in UK alternative dispute system (ADS) arose from increasingly complex and expensive litigation in Industrial Tribunals, as self – organisation form, in USA, at same time, it was a part of reasonable administrative politics;

– average mark of actual or potential tribunal applications, which solves by administrative procedures, varies between 75 and 86%.

– in USA, unlike in UK, the Ombudsman as Public Official has powers to solving the labour disputes.

As provides in previous papers, "native Individual Disputes' Resolution system is backward from the variety of aboard types greatly. There is only one body, which represents the extrajudicial procedure in this ones, – a commission on labour disputes (CLD) (A. Slusar, 2014)" [2, p. 132; 3]. So, for our state the UK – and US – labour disputes procedure experience is rather useful to creating such authorities as ACAS and/or FMCS (for individual labour disputes resolution) and revision of Ombudsman' role during such one. But not procedural improvement needs, to increase the effectiveness of labour disputes resolution system, which describes below.

Conclusion and recommendations. The main failure of Esplin's research consists in his enormous concentration on **procedural** improvements only. But the root of problem consists in **increasingly complex and expensive litigation in Courts**, which leads to improvement not only **procedure**, but also the **process** of labour disputes resolution. Solely in synergy of **procedural** and **processual** improvements there is the "shroud in mystery" of 100% effectiveness of labour disputes resolution ways, but not 75 or 86%, which needs further scientific background.

But, notwithstanding, for Ukraine, which labour disputes resolution system is backward from the variety of aboard types greatly, UK and US – experience are rather useful to creating such authorities as ACAS and/or FMCS (for individual labour disputes resolution) and revision of Ombudsman' role during such one (in means not only public, but private role, too), which also needs further investigations at same way.

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Колосов І. В. Процедури вирішення трудових спорів у Великобританії та США: «за» та «проти»

У пропонованій статті проводиться наукове дослідження переваг і недоліків судової та ефективності впровадження альтернативної (адміністративної, процедурної) системи вирішення трудових спорів. Добуті з міжнародного наукового огляду знання й інформація мають на меті висвітлити, яким є взаємозв'язок між процедурним і процесуальним шляхами вирішення трудових спорів із погляду їх ефективності. Проведено дослідження іноземних процедур попередження та вирішення трудових спорів, виділені їх особливості, здійснено їх порівняння, зроблені певні висновки, рекомендації щодо їх удосконалення з позицій процедурно-процесуального дуалізму шляхів вирішення трудових спорів.

Ключові слова: *судова система вирішення трудових спорів, альтернативна (адміністративна, процедурна) система вирішення трудових спорів, процедурний і процесуальний шлях вирішення трудового спору, ефективність системи вирішення трудових спорів, вирішення та попередження трудових спорів.*

Колосов И. В. Процедуры разрешения трудовых споров в Великобритании и США: «за» и «против»

В предлагаемой статье проводится научное исследование преимуществ и недостатков судебной и эффективности внедрения альтернативной (административной, процедурной) системы разрешения трудовых споров. Добытые из международного научного обозрения знания и информация имеют своей целью высветить, какая взаимосвязь существует между процедурным и процессуальным путем разрешения трудовых споров с точки зрения их эффективности. Проведено исследование иностранных процедур предупреждения и разрешения трудовых споров, выделены их особенности, осуществлено их сравнение между собой, сделаны определенные выводы, рекомендации относительно их усовершенствования с позиций процедурно-процессуального дуализма путей разрешения трудовых споров.

Ключевые слова: *судебная система разрешения трудовых споров, альтернативная (административная, процедурная) система разрешения трудовых споров, процедурный и процессуальный путь разрешения трудового спора, эффективность системы разрешения трудовых споров, разрешение и предупреждение трудовых споров.*