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Legal Sciences

LEGALITY AND OPPORTUNITY OF DISMISSAL AS A WAY TO TERMINATE THE INDIVIDUAL EMPLOYMENT CONTRACT

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ABSTRACT:
THE ROMANIAN LABOR CODE EXPRESSLY AND LIMITING ESTABLISHES THE SITUATIONS IN WHICH DISMISSAL AND THE PROCEDURE IN WHICH IT IS PERFORMED MAY BE FOLLOWED IN ORDER TO PREVENT THE ABUSIVE CONDUCT OF THE EMPLOYER IN CERTAIN SITUATIONS. IN ORDER TO ENSURE THE EMPLOYMENT STABILITY OF THE EMPLOYEES AND FOR THE RIGOROUS OBSERVANCE OF THE RIGHT TO DEFENSE, THE ROMANIAN LABOR LEGISLATION REFERS TO CERTAIN RULES THAT MUST NOT BE NEGLECTED ON THE OCCASION OF DISMISSAL. THE DISMISSAL OPERATES ONLY IN THE SITUATION WHEN THE EMPLOYER OR THE PERSON DESIGNATED FOR THIS PURPOSE ISSUES AN ACT, RESPECTIVELY A DISMISSAL DECISION, WHICH MUST COMPLY WITH THE CONDITIONS PROVIDED BY LAW. ROMANIAN LEGISLATION PROTECTS THE EMPLOYEE IN CERTAIN EXCEPTIONAL SITUATIONS AND IMPOSES CERTAIN PROHIBITIONS REGARDING THE DISMISSAL OF PREGNANT WOMEN, MOTHERS ON MATERNITY LEAVE AND PARENTS WHO ARE ON PARENTAL LEAVE..

KEYWORDS: DISMISSAL, LEGALITY, INDIVIDUAL EMPLOYMENT CONTRACT, OPPORTUNITY.

1.GENERAL ASPECTS

In accordance with the provisions of the Romanian Labor Code, dismissal represents the "termination of the individual employment contract at the initiative of the employer" (art. 58 para. 1), and may be ordered either for "reasons related to the employee" or for "reasons not related to the person of the employee." (art. 58 par. 2)

The legality of the dismissal consists in the fact that it is ordered by the employer only with the strict observance of the labor legislation, but also with the observance of the dispositions deriving from the internal regulations, from the individual labor contracts or from the collective labor contracts. The legislator has clearly outlined the limits within which the dismissal procedure takes place, and non-compliance with these limits entails the nullity of the dismissal decision.

The decision ordering the dismissal constitutes "the unilateral act of will by which the employer orders the termination of the individual employment contract in the cases and conditions provided by law."[2]

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The opportunity of dismissal is regarding the moment when the employer can appeal to this institution without violating the rights of the employee and work discipline.

If in the previous Romanian regulation the term of dismissal was provided in certain normative acts that regulated the termination, under certain conditions, of individual employment contracts of a group of employees, the current labor legislation uses this term for any termination of an individual employment contract at the initiative of the employer.[3]

2. DISMISSAL FOR REASONS RELATED TO THE PERSON OF THE EMPLOYEE

The current labor legislation clearly outlines the space in which the institution of dismissal may be manifested for reasons related to the person of the employee, article 61 of the Labor Code listing the cases in which it may intervene:

a) In case the employee has committed a serious violation or repeated violations of the rules of labor discipline or of those established by the individual employment contract, the applicable collective labor contract or the internal regulation, disciplinary sanction;

b) In case the employee is pre-trial arrested or arrested at home for a period longer than 30 days, under the conditions of the Code of Criminal Procedure;

c) In case, by decision of the competent bodies of medical expertise, the physical or mental incapacity of the employee is ascertained, fact that does not allow him to fulfill his attributions corresponding to the occupied job;

d) If the employee does not professionally correspond to the job where he is employed.

3. DISMISSAL FOR REASONS NOT RELATED TO THE EMPLOYEE'S PERSON

In accordance with art. 65 para. 1 of the Labor Code, this form of dismissal represents the termination of the contract, "determined by the suppression of the job held by the employee for one or more reasons not related to his person."

The reason for dismissal is not attributable to the employee, such as when an employee has committed a disciplinary offense, but the reason is determined by an external element, namely the suppression of the job.

This type of dismissal "is closely related to the employer's right to organize and manage his activity, a right that cannot be abused."[4]

The same article, but in paragraph 2, requires that the termination of employment be effective and have a real and serious cause.

In the same sense, the Constitutional Court retained by means of decision[5] no. 420 of 2013 that “the conditions imposed by art. 65 para. 2 of the Labor Code, seek to establish a balance between the two parts of the employment contract, respectively between the need to ensure the employer the freedom to dispose of the termination of employment when objective considerations require it - economic difficulties, transformations technological, reorganization of activity, etc.-, on the one hand, and the need to protect the employee from a possible abusive attitude of the employer, on the other hand."

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[2] Alexandru Țiclea, Decizia de concediere în Revista Română de Dreptul Muncii nr. 3.

[3] Alexandru Țiclea, Tratat de dreptul muncii- Legislație. Doctrină. Jurisprudență. Ediția a X-a, actualizată, (București: Editura Universul Juridic, 2016), 756.

[4] Felicia Roșioru, Dreptul individual al muncii, (București: Editura Universul Juridic, 2017), 616.

[5] Decizia nr. 420/2013 publicată în Monitorul Oficial al României, Partea I, nr. 48 din 21 ianuarie 2014.

The legal provisions in force do not impose on the employer the imperative obligation to prove the existence of economic difficulties, which involve concrete financial losses, but the employer must prove that he uses these measures to streamline the activity and also that these measures are taken in accordance with law and do not contravene the legal order.

Starting from the provisions of art. 65 para. 2 The Labor Code, in the literature[6] it has been circulated that a cause is real in the situation where it has an objective character, being imposed by the need to overcome technical difficulties, economic, economic imperative to increase labor productivity, adaptation to new technologies, and a cause is serious when the situation of the employer's unit is quite difficult, which alters its smooth running and evolution.

Considering the fact that the labor legislation does not refer to a clear enumeration of the real and serious causes that can determine the termination of the job, it results that the legislator left to the courts the interpretation of the concrete situations based on the evidence administered in the case.[7]

It was argued that "depending on the concrete situation, the courts must analyze all aspects of the case, both legality and, where necessary, the opportunity, which means the extent to which it was really necessary to abolish jobs (...); regarding the serious case, the courts must analyze not only if once an objective case has appeared (economic, technological, etc.) it is necessary to abolish the position / positions, but if that case necessarily implies the abolition of the respective position occupied by employees."[8]

4. DISMISSAL PROCEDURE

In order to protect the employee from possible abusive actions exercised by the employer on the occasion of dismissal, the Labor Code contains a series of provisions that must be strictly observed.

Pursuant to art. 63 of the Labor Code, dismissal for committing a serious misconduct or repeated violations of the rules of labor discipline, may be ordered only after the employer has completed the preliminary investigation. In order to carry out the preliminary research, the employee will be summoned in writing by the employer, regarding the object, date, time and place of the meeting. The dismissal decision is completely devoid of legal effects in the situation where the preliminary investigation is not followed.

In case of dismissal for professional misconduct, the prior evaluation of the employee is provided, and the non-observance of this procedure entails the absolute nullity of the dismissal.

The specialized literature briefly presented the stages that the professional evaluation procedure must contain:

- the constitution of the evaluation commission, by the act of the legal representative of the employer, composed, as the case may be, of the hierarchical boss of the employee, specialists in his field of activity, human resources inspectors, union representatives;

[6] Alexandru Țiclea, Tratat de dreptul muncii- Legislație. Doctrină. Jurisprudență. Ediția a X-a, actualizată, (București: Editura Universul Juridic, 2016), 773.

[7] Dănuți Țop, Tratat de dreptul muncii. Doctrină și Jurisprudență. Ediția a III-a, revăzută și adăugită, (București: Editura Mustang, 2018), 374.

[8] Vartolomei Brândușa, Considerații referitoare la cauza reală și serioasă în cazul concedierii din motive ce nu țin de persoana salariatului, în Dreptul nr. 5, 226-237.

- communicating the employee in writing, indicating the place, day, time of the meeting, its purpose and object, the manner of examination;
- possibly establishing a topic (bibliographies) that will be taken into account when evaluating and communicating it in due time to the employee;
- the actual examination of the evaluated by the respective commission;
- establishing the evaluation criteria (grading);
- the manner of adopting the decision of the commission and its communication to the employee and the management of the unit;
- the possibility of the evaluated person to contest the decision of the commission, being mentioned the competent internal body and the term for contesting.[9]

Still, we draw attention to the fact that "the court does not have the competence to assess the training correspondence of the dismissed person for professional misconduct, the employer being the only one able to decide, depending on the entire activity and performance of his employee."[10]

In practice, there are often situations in which dismissals are ordered for physical or mental incapacity of the employee, and labor legislation has established the employer's obligation to take all necessary steps to propose the employee other vacancies in the unit, compatible with his professional training or, as the case may be, with the work capacity established by the occupational medicine doctor.

If the employer does not have a vacancy in the unit he manages, he has the possibility to request the help of the territorial employment agency in order to redistribute the employee in question.

5. THE DECISION OF DISMISSAL - INSTRUMENT OF TERMINATION OF THE INDIVIDUAL EMPLOYMENT CONTRACT

The dismissal decision is an instrument for terminating the individual employment contract initiated by the employer without appealing to the employee's consent.

The labor legislation established in the task of the employer the obligation to issue the dismissal decision in compliance with the term provided by law. In the specialized literature it has been shown that the decisions issued after the fulfillment of the term provided by law are struck by absolute nullity.[11]

In order to increase the legislative protection and to prevent possible abusive behaviors on the part of the employer, the legislator did not allow this unilateral act of termination of the employment contract to be a discretionary one, and thus article 62 of the Labor Code regulates the dismissal decision for the following reasons relating to the employee's person:pre-trial detention for a period longer than 30 days, the physical and/or mental incapacity of the person concerned, which does not allow him to fulfill his duties corresponding to the job occupied and, last but not least, inappropriate professional job occupied by the person in question.

Regardless of whether we are in the presence of a dismissal decision for reasons related to the employee or for reasons independent of his person, not related to the employee,

[9] Alexandru Țiclea, Tratat de dreptul muncii- Legislație. Doctrină. Jurisprudență. Ediția a X-a, actualizată, (București: Editura Universul Juridic, 2016), 802.
[10] Țiclea, Tratat de dreptul muncii- Legislație..., 803.
[11] Dragoș Brezeanu, Regimul juridic al nulitatii in raporturile de munca, (București: Editura C.H. Beck, 2017), 150.

the employer has the legal obligation to specify under the sanction of nullity, the court and the term in which the decision can be challenged by employee.[12]

As in the case of other situations of termination of the individual employment contract at the initiative of the employee, the labor legislation provides for the institution of the notice period that the employer is obliged to grant to the employee through the dismissal decision. In our opinion, the notice period offers the employee the possibility to look for a new job that will be based on professional training, but also on satisfying material needs.

The notice period has aroused particular interest for the doctrine[13], which has highlighted the fact that it constitutes a protection granted to the employee who is in the situation of being dismissed and who thus benefits from the application of the principle of prior notice of termination of any contract.

In the specialized literature[14] it is circulated the fact that the labor legislation provides two categories of prohibitions from dismissal, some with permanent character and others with temporary character.

A permanent ban is provided by Article 59 of the Labor Code which provides that it is prohibited to dismiss employees on grounds of sex, age, social origin, belonging to an ethnic group, race, or people, sexual orientation, political opinions, religious beliefs, disability, trade union membership, the exercise of the right to strike or other trade union rights, or for illicit, immoral or abusive causes.

The temporary prohibitions are provided by article 60 par. 1 of the Labor Code: during the temporary incapacity for work, established by medical certificate according to law, during the suspension of activity due to the establishment of quarantine and, last but not least, during the period when the employed woman is pregnant, insofar as the employer has taken note of this fact prior to the issuance of the dismissal decision.

These temporary or permanent prohibitions of dismissal, being rights recognized by law, do not offer the possibility for employees to validly give them up.

The labor legislation through its rigor clearly stipulates what substantive and formal conditions must be met by the dismissal decision.

Thus, article 62 par. 3 stipulates that "the decision is issued in writing and, under the sanction of absolute nullity, must be motivated in fact and in law and must include clarifications regarding the term in which it can be challenged and the court in which it is contested."

According to article 76 par. 1 of the Labor Code, the dismissal decision must be mandatory:

"a) the reasons that determine the dismissal;

b) the duration of the notice;

c) the criteria for establishing the order of priority, according to art. 69 para. 2 lit. d, only in case of collective dismissal;

d) the list of all the jobs available in the unit and the term in which the employees are to choose to fill a vacant job, under the conditions of art. 64."

In the situation where the dismissal is ordered for disciplinary reasons, the dismissal decision, according to art. 252 of the Labor Code, under the sanction of absolute nullity, must

[12] Brezeanu, Regimul juridic al nulitatii in raporturile de munca..., 153.

[13] Valeriu Zanfir, Codul muncii comentat, (București: Editura Tribuna Economică, 2004), 198.

[14] Răzvan Radu Popescu, Dreptul muncii. Legislație internă si internațională. Doctrină și jurisprudență. Curs universitar. Ediția a II-a revazută și adăugită (București: Editura Universul Juridic, 2016), 198.

contain "the description of the deed that constitutes a disciplinary violation, the specification of the provisions of the personal statute, of the internal regulation or of the applicable collective labor contract, which were violated by the employee, the defenses made by the employee during the preliminary disciplinary investigation or the reasons why, under the conditions provided by law, the investigation was not carried out, the legal basis under which the disciplinary sanction is applied, the term in which the sanction can be challenged and the competent court where the sanction can be challenged."

All these elements that the decision to apply the disciplinary sanction must fulfill, have the role, first of all, to inform concretely and completely the employee regarding the facts, reasons and legal grounds for which the sanction is applied, including regarding the means of appeal and the terms in which he has the right to question the validity and legality of the measures ordered by the unilateral will of the employer.[15]

In accordance with the provisions of Article 63 of the Labor Code, the employer may dismiss an employee for committing a serious misconduct or repeated violations of the rules of labor discipline only after conducting prior disciplinary investigation and within the time limits set by the Labor Code.

On the other hand, in case of professional misconduct, the employee may be dismissed only after his prior evaluation according to the evaluation procedure provided in the collective labor contract or, in its absence, by the internal regulation.

Regardless of whether the dismissal decision was ordered by the employer for reasons related to the employee's person or for reasons not related to his person, the initiator of the decision may reconsider this measure if he finds, either directly or after notification by the employee or by another person, that this measure was taken unfoundedly or illegally. It was found that the revocation of the dismissal decision at the initiative of the employer can take place because it is an individual act without jurisdiction.[16]

"The revocation of the employer's decision leads, in case there is a pending legal labor trial regarding the challenging against the measure of termination of the individual employment contract, to the termination of the trial, the challenge being rejected as without object."[17]

"So, the working relationship between the parties will resume as if it was never interrupted."[18]

6. CONCLUSIONS

In conclusion, the dismissal is the instrument that the employer has at hand and to which he can resort without the presence of the employee's consent, but under the conditions expressly provided by the labor legislation.

Considering that following the dismissal of the employee by the employer, the validly concluded individual employment contract terminates, despite the fact that throughout the employment relationship both the employer and the employee consult and inform each other according to the principle of consensuality and good faith, in the doctrine it has been shown that this way of terminating the employment relations "does not constitute a violation of the

[15] Dănuți Țop, Tratat de dreptul muncii. Doctrină și Jurisprudență. Ediția a III-a, revăzută și adăugită, (București: Editura Mustang, 2018), 387.

[16] Alexandru Țiclea, Tratat de dreptul muncii, (București: Editura Universul Juridic, 2014), 671.

[17] Ion Traian Ștefănescu, Revocarea de către angajator a actelor unilaterale, în „Dreptul`` nr. 2, 2015, 68

[18] Dănuți Țop, Dreptul securității sociale (Târgoviște: Editura Bibliotheca, 2005), 206.

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employee's right to work nor of the principle of labor freedom, because the employee's stability in work and freedom of work are not absolute."[19]

[19] Alexandru Athanasiu, Luminița Dima, Dreptul muncii, (București: Editura All Beck, 2005), 123

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