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A New Approach in the Social Field – Law No. 62/2011

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Abstract: Law no. 62/2011 of social dialogue, as it was regulated by the lawmaker, comes and reunites within it a series of fundamental institutions in social matters, such as: social dialogue (trade unions, employees' representatives, owners' associations), the Economic and Social Council, the collective employment contract, labour conflicts and, not lastly, a series of elements pertaining to labour jurisdiction. It thus abrogates the old regulations in the matter: Law no. 54/2003 with respect to trade unions, Law no. 356/2001 regarding owners' associations, Law no. 109/1997 regarding the organizing and functioning of the Economic and Social Council, Law no. 130/1996 with respect to the collective employment contracts, Law no. 168/1999 regarding the settling of labour conflicts and Government Decision (G.D.) no. 369/2009 regarding the establishment and functioning of the social dialogue commissions at the level of the central public administration and at the territorial level.

Keywords: collective relations; trade union; collective labour conflicts; jurisdiction

1. General Aspects

Law no. 62/2011 of social dialogue (published in the Official Gazette no. 322 of May 10th, 2011), as it was regulated by the lawmaker, comes and reunites within it a series of fundamental institutions in social matters, such as: social dialogue (trade unions, employees' representatives, owners' associations), the Economic and Social Council, the collective employment contract, labour conflicts and, not lastly, a series of elements pertaining to labour jurisdiction. It thus abrogates the old regulations in the matter: Law no. 54/2003 with respect to trade unions (published in the Official Gazette no.73 of February 5th, 2003), Law no. 356/2001 regarding owners' associations (published in the Official Gazette no. 380 of July 12th, 2001), Law no. 109/1997 regarding the organizing and functioning of the Economic and Social Council (published in the Official Gazette no. 141 of July 7th, 1997), Law no. 130/1996 with respect to the collective employment contracts, Law no. 168/1999 regarding the settling of labour conflicts (published in the Official Gazette no. 227 of April 7th, 2009) and Government Decision (G.D.) no. 369/2009 regarding the establishment and functioning of the social dialogue commissions at the level of the central public administration and at the territorial level.

Thus, the lawmaker takes one step forward towards what means modern legislation in which all fundamental problems in social matters are found regulated in a single normative act. We consider that all these aspects regulated by Law no. 62/2011 of social dialogue could have been established by the Labour Code, in a unitary vision on social legislation. Still, if the lawmaker opted for a separate regulation of these issues, we consider that it would have been more suitable the name of "**law that regulates the collective work relations**" and not only social dialogue.

It must be mentioned, right from the beginning, the fact that the new law no longer covers the entire problematic subjected to the previous regulation by Law no. 130/1996 of collective employment contracts and by Law no. 168/1999 of labour conflicts. Thus, the new law establishes in Title VII only

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the aspects pertaining to the collective labour negotiations (for instance, the institution of the suspension of the collective employment contract is no longer present), and Title VIII, which regulates the modalities for solving labour conflicts contains a series of brief provisions, in comparison to the old regulation. These aspects, we believe, are not in the sense of a modern regulation, which should be clear, precise, and which should cover the possible problems notified, in time, with respect to the old regulation (not to create new ones).

2. Disputed Aspects regarding Law no. 62/2011

Art. 3 of Law no. 62/2011, as regulated, at present, respectively: *"the persons employed with individual employment contract, the public servants and the public servants with special statute in the conditions of the law, the cooperative members and the agricultural workers employed are entitled, without any restraint or prior authorization, to establish and/or to adhere to a trade union"*, restrains the freedom of association in trade unions, as follows: the liberal professions are excepted from the category of persons who can establish and/or adhere to a trade union.

In this sense, we consider that, in virtue of the principle of trade union freedom, all workers, except those employed within the armed forces and the police, should have the right to establish and to affiliate to organizations of their choice.

Also, the request, upon the establishment of a trade union, that the founding members are employees of a single owner also represents a breach of the principle of trade union freedom. In the specialty literature was underlined the fact that *"it is an axiom of contemporaneity the fact that public power, in a democratic society, does not intervene with respect to the materialization of the association right"*.

Moreover, according to the actual regulation, the persons apt for work but who are, temporarily, without a job or in unemployment, cannot be part of a trade union, which, in our opinion represents also a breach of the exercise of the right to free association (in the notion of worker, as defined at the European level by the Court of Justice in Luxemburg, being also classified the persons apt for work but who are not working at a given time, being between two jobs).

The formulation in art. 8 of the law is unclear, since it states that: *"in the management bodies of the trade union organization can be elected the persons who...."*, as long as art. 3, para. 2 clearly establishes that *"for the establishment of a trade union is necessary a number of at least 15 employees within the same unit"*. We consider that, logically, from the trade union management body can be part only a person who is a member of the respective trade union, hence, only a person who has the quality of employee (and not any person); thus, the formulation in art. 8 is improper, instead of the term "persons" there should have been used "employees".

Art. 9 of the law establishes the fact that *"to the members of the elected management bodies of the trade union organizations is provided the protection of the law against any form of conditioning, constraint or limitation in the exercise of their functions"*, while art. 63 para. 2, which regulates the same kind of protection, only for owners' associations, states: *"to the members of the management bodies of the owners' associations organizations is provided the protection of the law against any forms of discrimination, conditioning, constraint or limitation in the exercise of their duties and/or mandate"*. We feel that this normative act should contain a series of provisions, in the mirror, similar, for both organizations, such as the possible forms of discrimination to also be indicated in the legal text targeting the trade union organization.

We consider that art. 10 para. 1 of Law no. 62/2011 implicitly abrogates art. 220 para. 2 of the Labour Code, respectively: *"there are forbidden the modification and/or termination of the individual employment contracts of the trade union organizations members for reasons pertaining to the belonging to the trade union and the trade union activity"* implicitly abrogates *"throughout the entire term of exercising their mandate, the representatives elected to the trade union management bodies,*

cannot be fired for reasons pertaining to the fulfillment of the mandate they received from the employees in the unity”.

We believe that the harshening of the criteria for establishing representativeness for the trade union organizations at the level of the unit, where the number of the trade union members must represent half plus one of the number of employees within the unit (previously, it was set at 1/3 of the number of employees in the entity) is one that, although does not contradict the international regulations in the matter, will lead to the real impossibility for the trade unions to be able to fulfill this criterion and, as a consequence, the social protection of the employees within the unit will be affected, since they will no longer benefit of a representative trade union organism.

In order to gain legal personality, the special empowered person of the founding members of the owners' organization will have to submit a registration application to the court in whose territorial range is the headquarter, following the same procedure as in the case of gaining the legal personality by the trade union organization. With the application, there will also be attached the following proving documents:

- minute with the establishment of the owners' organization;
- statute;
- list of the members of the executive managing body of the owners' organization;
- proof of the headquarters existence.

In this way, in the case of owners' organization the same procedure is followed for gaining the legal personality as in the case of the trade union organizations (without the need for the owners' organizations to gain legal personality on the grounds of another special law).

In case an owners' or trade union organization which signed a collective employment contract loses its representativeness (either upon the completion of the 4 year term it no longer fulfills the representativeness conditions required by law, or, during the 4 years, it loses this quality, regardless of the manner) any interested party having the ability to negotiate the respective collective contract is entitled to request (from the other party) the renegotiation of the contract, prior to its expiry term. If this renegotiation is not requested by anyone, the collective employment contract will remain in effect until the expiry of the term for which it was concluded (Ștefănescu, 2010).

This art. 222 para. 3 of Law no. 62/2011, as regulated, we believe may create a state of uncertainty (insecurity among the employees with respect to the provisions within the collective employment contract), and at the moment when the trade union organization, in the conditions of the new regulations, no longer fulfills the representativeness criteria, the owner may request the renegotiation until the expiry of the respective collective employment contract validity. Thus, through the renegotiation which no longer occurs between the same two parties that initially negotiated the collective employment contract, the employees may find themselves in the situation in which the new renegotiated provisions are unfavorable to them (which contradicts the spirit of what mean the institution of the renegotiation between the same parties and of the differences that may occur when either party is changed).

Art. 88 of Law no. 62/2011 establishes the fact that the *Economic and Social Council has the obligation to analyze the drafts of normative acts received and to transmit its approval within maximum 7 working days since the receipt of the request.*

Hence, the lawmaker established the obligation to request the approval of the ESC for all categories of normative acts which are of its competence, as well as its obligation to answer the requests; in case the ESC does not answer or answers exceeding the term established by law, this will allow the initiator of the normative act draft to send it for approval without the ESC consent, but with the mentioning of this situation.

The Romanian lawmaker substantially modified the legal provisions regarding the collective negotiation, giving them a new legal perspective, as follows:

- collective negotiation is mandatory only at the level of the unit (according to art. 229 para. 2 of the Labour Code and to art. 129 of Law no. 62/2011); thus disappears the provision according to which the collective negotiation is mandatory, regardless of the level.
- the negotiation initiative belongs to the employer, and if it refuses to start negotiation, in the conditions of the law, the deed is a misdemeanor;
- in case the employer does not initiate the negotiation, it will be able to commence, upon the written request of the representative trade union organization, or of the employee's representatives, within maximum 10 calendar days since the communication of the request; therefore, within 10 calendar days will start the actual negotiation;
- within this term of 10 days, a new term of 5 calendar days starts running, during which the employer or the owners' organization has the obligation to summon all entitled parties in view of negotiating the collective employment contract (we consider that the non-fulfillment of this obligation by the employer should bring forth the same contraventional sanction established by art. 217 letter b) of the Law of social dialogue, since it is also a matter of the employer's refusal to negotiate, seen *lato sensu*);
- the duration of the collective negotiation cannot exceed 60 calendar days, except with the parties' agreement (hence, it is a recommended term);
- the provision establishing the minimal content of the object of the collective negotiation was removed; this situation, in practice, can create a series of problems to the social partners who are no longer held by the obligatory negotiation of clauses essential to any employment contract.

Also, it must be underlined the fact that, according to the provisions of the ILO Convention no. 87/1948 regarding trade union freedom and the protection of the trade union right, one of the main goals of guaranteeing trade union freedom is to allow owners and their employees to associate in organizations independent from the public powers and to regulate by means of collective employment contracts certain salary rights and labour conditions. At the same time, the ILO Convention no. 98/1949 regarding the application of the principles of the right to organize and to collective negotiation, in art. 4, which refers to the encouragement and promotion of collective negotiation, is established the fact that these rules apply both to the public and to the private sector (A. Popescu, 2008).

- the clauses of the collective employment contracts can be renegotiated periodically, according to the contractual provisions; this provision comes and modifies the previous legal text, which established the fact that these clauses are renegotiated annually; we consider that the current regulation is a modern, flexible one, which corresponds much better to the social realities, allowing the parties to establish in mutual agreement if and when they will renegotiate certain clauses;
- all aspects pertaining to the object of the negotiation will be comprised in minutes drafted at the end of each negotiation round, and which must be signed by the parties' empowered representatives; the withdrawal of a party from the negotiation is not equivalent to the interruption or cease of the negotiations, but constitutes a modality through which the parties understand to capitalize on their right to negotiate; the lawmaker established that the date on which the parties meet for the first time represents the date since which is it considered that the negotiations were commenced and the 60 day term starts running;
- we believe that, as art. 133 para. 1 of the Law of social dialogue was written, it is a restrictive vision, as follows: the clauses of the collective employment contracts produce effects as indicated below:
 - a. for all employees within the unit, in case of the collective employment contracts concluded at this level;
 - b. for all employees hired within the units which are part of the group of units for which the collective employment contract was concluded;

c. for all employees hired within the units of the activity sector for which the collective employment contract was concluded **and which are part of the owners' organizations signatories of the contract;**

- the collective negotiation in the public sector requires the verification of the available resources within different bodies or enterprises, if these resources depend on the state budget, and if the validity period of the collective employment contract in the public sector does not always coincide with that of the budget law, a series of problems will emerge.

The lawmaker established a new modality for representing the parties at the negotiation of the collective employment contracts, in the units in which there is no (more) representative trade union, as follows:

- if there is a trade union within the unit, legally established, but not representative, affiliated, though, to a trade union federation representative within the activity sector to which the unit belongs, the negotiation will be performed by the representatives of the trade union federation, upon the request and on the basis of the trade union mandate, together with elected representatives of the employees;
- if there is a trade union not affiliated to a trade union federation representative within the activity sector to which the unit belongs or if there is no trade union, the negotiation will be performed only by the employees' representatives.

The collective employment contract is concluded, in all cases, for determined time, which cannot be shorter than 12 months and longer than 24 months (according to art. 141 para. 1 of Law no. 62/2011). By means of this regulation, the Romanian lawmaker opted for restricting the maximum period for which the contract can be concluded, to 2 years, with the possibility of extending it, only once, with at most 12 months, but within the term of 24 months.

Also, the new regulation no longer establishes the possibility of concluding a collective employment contract for a period shorter than 12 months, for a certain determined work; hence, a collective employment contract can be concluded for a determined work, on condition that it lasts at least 12 months, but no more than 24 months. We consider that, exceptionally, a collective employment contract will be able, in reality, to last less than 12 months, only if it was concluded for a duration of minimum 12 months, for the execution of a determined work, which was completed earlier than the 12 months and, thus, the collective employment contract rightfully terminated (R.Popescu, 2011).

3. Conclusions

Law no. 62/2011 no longer regulates the possibility of concluding a single collective employment contract at the national level. We believe that this lawmaker's option considerably diminishes the importance of the collective employment contract institution. The absence of a single collective employment contract at the national level will be felt especially by the employees, who, in this way, will be deprived of a level of social protection, between the law and the individual employment contract, creating a void through the disappearance of this institution. The collective employment contract must be considered the working instrument of the trade union organizations, in the same way as the internal regulation is the work instrument of the owners' organization; the disappearance of the collective employment contract at the national level means, in reality, one less protection instrument, for the employees, which, in our opinion, contradicts the spirit of the community regulations in the matter, which promote the concept of social protection at the national level, through means specific to each state.

Art. 153 of Law no. 62/2011 establishes the fact that *"any trade union organization legally established may conclude with an employer or with a owners' organization any other types of agreements, conventions or understandings, in written form, which represent the law of the parties, and whose provisions are applicable only to the members of the signing organizations"*. We consider that this

provision should be interpreted in the sense that: any trade union organization, regardless of where it is representative or not, can negotiate and conclude with the owners' organization of the same level an understanding which to become the law of the signing parties, only with respect to those aspects that do not make the object of the regulation on the basis of a collective employment contract.

The lawmaker, in the current regulation, no longer distinguishes between conflicts of interests and conflicts of rights, but performs a different division, respectively, in collective labour conflicts and individual labour conflicts. In reality, the settlement of the labour conflicts must follow the same two large problematic issues, respectively, the conflicts arisen with the occasion of negotiating the collective employment contracts and the conflicts that have as object the exercising of certain rights or the fulfillment of certain obligations deriving from laws or other normative acts, as well as from the collective or individual employment contracts (Alex.Țiclea, 2011).

In conclusion, through the Law of social dialogue were established a series of limitations of the right to strike, a right with constitutional roots, as follows:

- the decision to declare the strike is made by the representative trade union organizations participating to the collective labour conflict, **with the written agreement** of at least half of the members of the respective trade unions (art. 183 para. 1) and for the employees of the units where there are not organized representative trade unions, the decision to declare a strike is made by the employees' representatives, **with the written agreement** of at least one quarter of the number of employees within the unit, or, as the case may be, of the sub-unit or compartment (art. 183 para. 2).

By means of this legal text a limitation of established on the right to strike, consisting in the express requirement of the agreement expressed **in writing**. The mandatory establishment of the written form for the agreement expressed in view of starting the strike is of a nature to limit even more the exercise of the right to strike. In what concerns the situation established by art. 183 para. 2, we consider that the disposition from the old regulation should have been preserved, regulation which mentioned the fact „that the decision to declare a strike is made through secret vote ...”, such as to not put additional pressure on the employees within the unit.

- the actual strike cannot be started unless previously were exhausted the possibilities of solving the collective labour conflict, through the obligatory procedures, only after the running of the warning strike, and if the moment of its start was brought to the knowledge of the employers, by the organizers, with at least 2 working days in advance (art. 182);

We believe that the correlation of the possibility of starting the actual strike with the previous running of the warning strike breaches the right to strike, because it is a matter of two legal, distinct, types of strike, which must not be necessarily correlated; the obligation of the employees to previously go through this stage actually makes more difficult the access to exercising a fundamental right.

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