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About the Collective Dismissal of Employees - Practical Aspects

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Abstract: The employment relationship is a contractual one and as such must have all the basic elements of an enforceable contract to make it legally binding. In strict contractual terms, the offer is made by the employer and formally accepted by the employee. Once the acceptance has taken place, there is a legally binding agreement and an action will lie against the party who breaches that agreement, even though it may only just have come into existence. An employment contract, however, is unlike most other contracts. Although the parties will have negotiated the main terms, we shall see that a large number of terms will be implied into the agreement from all sorts of different sources and will not have been individually negotiated by the parties at all. This is what makes an employment contract so different from other contracts. We think this article is an important step in the disclosure of the problem erased by this two concepts.

Keywords: initiative; consultation; criteria; compensatory payment

According to art. 68 of the Labour Code, by “*collective dismissal* is understood the dismissal within a period of 30 calendar days, for one or several reasons not related to the person, of a number of:

- at least 10 employees, if the employer performing the dismissal has more than 20 and less than 100 employees;
- at least 10% of the employees, if the employer performing the dismissal has at least 100 employees, but less than 300 employees;
- at least 30 employees, if the employer performing the dismissal has at least 300 employees.

When determining the actual number of employees collectively dismissed, according to para. (1), in the calculation are comprised also those employees whose employment contracts were terminated from the employer’s initiative, for one or several reasons not related to the person of the employee, provided that there are at least 5 dismissals”.

Hence, when an employer individually fires, within an interval of 30 days, at least 5 employees, this will be considered as a masked form of collective dismissal, and those employees will be taken into account when establishing the number of dismissed employees which make a dismissal to be qualified as collective.

In the spirit of Directive 98/59/EC, the Court of Justice of the European Union decided that the *concept of collective dismissal incorporates any termination of the employment contracts not due to the worker’s will and, hence, without his/her consent*².

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² Decision of 12 October 2004, matter C-55/02, Comisia v. Portugal (published in OJEU C 300 of 14 December 2004).

We believe that the legal provisions of art. 68 of the Labour Code must be analyzed from the following perspective: number of dismissed employees, at least 10 employees, at least 10% of the employees, at least 30 employees may comprise:

- *only* dismissals not related to the employee's person (regulated by art. 68 para. (1) corroborated with art. 65 of the Labour Code);

- *by assimilation*, other forms of termination of the employment contract, from the employer's initiative, which are not based on art. 68 para. (1) corroborated with art. 65, but which are, still, assimilated to collective dismissals, if proof is given that they occurred due to the employer's initiative and refer to at least 5 persons; in this situation classify either the forms of individual employment contract termination *through the parties' agreement, but executed at the employer's request*, or the forms of *resignation caused by the pressure exerted by the employer* (for example, the blank signing of the resignation document upon the conclusion of the employment contract) (Ștefănescu, 2014). The Court of Justice of the European Union decided to assimilate to dismissals "the event which has the value of licensing, being constituted by an expression of the employer's will to terminate the employment contract"¹. However, in practice, it is very difficult to prove the pressure exerted by the employers upon their employees, with a view to terminating the employment contract, even if the law allows for the use of all means of evidence.

The scope of the legal regulations in matter of collective dismissal suffered a series of changes, as follows:

- *on the one hand*, the provisions in the matter regarding the informing, consulting and the procedure of the collective dismissal no longer apply to employees working within public institutions and authorities; the collective dismissal procedure is no longer applicable, except to the private sector, which is in accordance with the provisions of Directive 98/59/EC;

- *on the other hand*, the same provisions in matter of collective dismissals no longer apply to individual employment contracts concluded for determined time, except for the cases where these dismissals occur before the date of expiry of the said contracts.

The information, consultation of employees and the procedure of collective dismissal – is established by art. 68-73 of the Labour Code. Thus, the employer aiming to perform a collective dismissal has, mainly, the following obligations:

- *on the one hand*, to initiate, in due time, in order to make it possible to reach an agreement (or at least a compromise), consultation with its trade union or, as the case may be, with the employees' representatives, with respect to at least the following aspects: methods and means of avoiding collective dismissals or of reducing the number of employees who will be affected by these measures, corroborated with the diminishing of the consequences of the dismissal, by means of enabling social measures aiming, among others, support for the re-qualification or professional reconversion of the dismissed employees (art. 69 para. (1) of the Labour Code);

- *on the other hand*, during the period of consultations, in order to allow the trade union or the employees' representatives, as the case may be, to formulate proposals, in a real manner and in due time, the employer has the obligation to supply all relevant information and to notify them, in writing, with respect to the following aspects: total number and categories of employees; the reasons determining the dismissal envisaged; number and categories of employees who will be affected by the dismissal; the criteria taken into consideration, according to the law and/or the collective employment contracts, in order to establish the priority order in dismissal; the measures considered in order to limit the number of dismissals; the

¹Matter C-188/2003, application for prejudicial decision related to the interpretation of art. 1-4 of Directive 98/59/EC introduced by Arbeitsgericht Berlin.

measures for diminishing the consequences, which are going to be given to the dismissed employees, according to the legal dispositions and/or the collective employment contracts; the date from which or the period in which the dismissals will occur; the term during which the trade union or, as the case may be, the employees' representatives can make proposals for the avoidance or diminishing of the number of dismissed employees (art. 69 para. (2) of the Labour Code).

According to art. 69 para. (3) of the Labour Code, the assessment of the individual performance objectives also plays a major role in the collective dismissal. Compared to the past – when the social criteria established through the collective employment contracts were in the front position for distinguishing between the employees affected or not by the collective dismissal –, at present priority is given to the criteria of value order, respectively the extent to which the performance objectives are achieved. Subsequently, if it is still necessary, the social criteria will also be considered (Țiclea, 2014).

The above obligations will be maintained regardless of whether the decision determining the collective dismissal is taken by the employer or by an enterprise having control over the employer. In addition, in the second case, the employer cannot oppose the fact that the enterprise which has control did not supply the necessary information in view of complying with the obligation to inform the trade union (art. 69 para. (5) of the Labour Code).

The employer must also communicate a copy of the notification to the territorial labour inspectorate and to the territorial workforce employment agency, on the same date when it communicated the same to its trade union or, as the case may be, to the employees' representatives (art. 70 of the Labour Code).

Subsequently, within a term of 10 calendar days from receiving the notification, the trade union or, as the case may be, the employees' representatives can propose to the employer measures in order to avoid or diminish the number of dismissed employees (art. 71 para. (1) of the Labour Code).

The employer has the obligation to reply, in writing and motivated, to the proposals formulated by the trade union or by the employees' representatives, as the case may be, within 5 days from receiving them (art. 71 para. (2) of the Labour Code).

In the situation when the employer will decide, in spite of consulting the trade union or the employees' representatives, to apply the measure of collective dismissal, it has the obligation to notify, in writing, the Territorial Labour Inspectorate and the territorial workforce employment agency, *with at least 30 calendar days before issuing the dismissal decisions*. The notification must comprise: all relevant information regarding the intention of collective dismissal, the results of the consultations with the trade unions or with the employees' representatives (recorded in the minutes), especially the dismissal reasons, the total number of employees and, respectively, the number of those affected by the dismissal, the date from which or the period within which the dismissals will occur (art. 72 para. (2) of the Labour Code). On the same date, *a copy of this notification must be also communicated to the trade union or to the employee's representatives* (art. 72 para. (3) of the Labour Code).

The trade union or the employees' representatives can send their points of view to the territorial labour inspectorate.

Upon the motivated request of either party, the employer or the trade union, approved by the territorial workforce employment agency, the inspectorate may order the reduction of the period of 30 calendar days set for notification prior to the date of issuing the dismissal decision. In the same way, at the motivated request of either party, the labour inspectorate, after consulting the territorial workforce employment agency may order, on the contrary, the postponement of the moment of issuing the collective dismissal decisions with maximum 10 calendar days, in case the aspects related to the collective dismissal cannot be settled until the

date established through the dismissal notification, transmitted by the employer, as being the date of issuing the dismissal decisions (art. 73 para. (2) of the Labour Code). The Territorial Labour Inspectorate has the obligation to inform, in writing, within 3 working days, the employer and its trade union or the employees' representatives, as the case may be, with respect to postponing the moment of issuing the dismissal decision, as well as of the reasons that were at the basis of taking this decision (art. 73 para. (3)).

Throughout this entire period established in art. 72 para. (1), of 30 calendar days, the *territorial workforce employment agency must search for solutions to the problems raised by the foreseen collective dismissals and communicate them in due time with the employer and its trade union or the employees' representatives*(art. 73 para. (1) of the Labour Code).

According to art. 74 of the Labour Code, in case that the employer who ordered collective dismissals will hire, within 45 calendar days from the dismissal, will have to give *priority at employment* to the employees collectively dismissed before, for the re-established positions, without subjecting them to any exam, competition or trial period. If, within 45 days, the activities whose cease has led to the collective dismissals will be resumed, the employer, according to art. 74 para. (2), will send a written communication in this sense to the employees who had been dismissed from the positions whose activity is resumed in the same condition of professional competence. It is noted that, on the one hand, it is not obligatory that all prior professional activities are resumed, but only a part of the activities can be resumed, which require the work of only a part of the employees dismissed before (only the latter will receive notifications), and, on the other hand, the activities resumed must presuppose the same conditions of professional competence, in the contrary case, the employer having no obligation to send notifications to the employees dismissed before from their positions. The efficiency of applying this method imposes that a written notification is sent to each employee, concomitantly with information measures at the employer's headquarters and/or publication in mass-media (Ștefănescu, 2014).

The employees have available a term of maximum 5 calendar days from the date of the notice communicated by the employer, to manifest in writing their consent regarding the job offered. If the employees who have the right to be rehired do not manifest their consent, in written form, or they refuse the job offered, the employer will be able to make new hiring on the positions remained vacant. Any employment on the position of the hired person, before the person in question expressed his/her viewpoint, within the term set by the law, is sanctioned with the nullity of the respective employment.

After the collective dismissal, the employees are entitled to certain *compensatory payments*, according to Government Expedite Ordinance no. 98/1999 regarding the social protection of persons whose individual employment contracts will be terminated as a result of collective dismissals¹.

In fact, the compensatory payments represent an amount of money whose monthly value is equal to the average salary per entity, achieved by the person in question in the month prior to his/her dismissal (according to art. 28 of Government Expedite Ordinance no. 98/1999).

The compensatory payments are usually provided for from the salary fund and present the following characteristics:

- the right to compensatory payment emerges on the date of communicating the written decision of collective dismissal and is given to each dismissed employee, only once for the dismissals made within the same entity;
- the amounts of money are paid in equal monthly installments, only if the former employee does not start another job, hence, if he/she became unemployed;

¹ Published in the Official Gazette no. 303 of 29 June 1999, as subsequently modified and completed.

- the compensatory payments can also be cumulated with other advantages and rights established in the collective employment contracts;
- in all cases, the employees dismissed through collective dismissals will benefit of the unemployment aid (established on the date of dismissal, but suspended during the period of paying the compensatory payments and put into payment in the first month after ceasing the compensatory payments).

In case the employer, who took the measure of the dismissal, establishes, following a notification, or out of its own initiative, the lack of grounds or the unlawfulness of the measure taken, it usually can revisit the measure, revoke it through unilateral act, symmetrical to the one it abolishes (Țop, 2015). Revocation is possible because the act of dismissing an employee represents an individual act without jurisdictional character.

The revocation act must fulfill the following cumulative requirements:

- must come from the same body which decided the dismissal;
- must have written form;
- must operate for reasons of unlawfulness and/or lack of grounds (Athanasiu & Dima, 2005).

The revocation of the employer's decision leads, in case there is a labour litigation pending before the court, regarding the solving of the contestation against the measure of the termination of the individual employment contract, to the cease of the trial, the contestation going to be rejected as having become without object. Hence, the employment relationship between the parties will be resumed as if it had never been interrupted¹.

According to art. 78 of the Labour Code, "the dismissal ordered in violation of the procedure established by law falls under absolute nullity".

In all cases, the nullity is established by the Tribunal or the Court of Appeal, at the request of the person in question.

According to art. 77 of the Labour Code, the rule is established that "in case of labour conflict, the employer cannot invoke before the court other reasons of law or of fact than those mentioned in the dismissal decision". The absence from the dismissal decision of essential elements established by art. 76 of the Labour Code, such as: *reasons which determined the dismissal, the term of prior notice, the criteria for setting the priority order in case of collective dismissal, the list of all jobs available within the entity and the term within which the employees are going to opt to occupy a vacant position* – cannot be fulfilled by acts subsequent or simultaneous with the issuing of the decision, not through defense before the court of law by the employer.

It must be noted that through Decision no. 8/2014², the High Court of Cassation and Justice admitted the recurses in the interest of the law formulated by the attorney general of the Prosecutor's office attached to the High Court of Cassation and Justice and by the management College of Constanța Court of Appeal, considering that: "in interpreting and applying the dispositions of art. 78 of the Labour Code, with reference to art. 75 para. (1) of the same Code, not granting the prior notice with the minimum duration established by art. 75 para. (1) of the Labour Code, respectively with the duration comprised in the collective or individual employment contracts, if the latter is more favorable to the employee, brings forth

¹ C. Ap. Brașov, work litigations and social security section, Dec. no. 201/M/2008.

² Published in the Official Gazette no. 138 of 24 February 2015.

the absolute nullity of the dismissal measure and of the dismissal decision.

In interpreting and applying the dispositions of art. 76 letter b) of the Labour Code, related to the dispositions of art. 78 of the same code, the absence from the dismissal decision of the mention regarding the duration of the prior notice given to the employee is not sanctioned with the nullity of the dismissal decision and measures, when the employer proves that he gave the employee the prior notice of the minimum duration indicated in art. 75 para. (1) of the Labour Code or of the duration indicated in the collective or individual employment contracts, when the latter is more favorable to the employee”.

In conclusion, if the prior notice is given to the employee, in fact, the manner chosen by the employer to communicate it to the employee is of no relevance, the nullity of the dismissal decision in case of not communicating in writing the prior notice term being not used.

Therefore, according to art. 80 para. (1) of the Labour Code, in case of establishing the lack of grounds and/or the unlawfulness of the dismissal act, the court will order the employer *to pay a compensation equal to the indexed, increased and reupdated salaries and with the other rights the employee would have benefitted of* if he/she would not have been fired. This situation must be corroborated with the provisions of art. 38 of the Labour Code, according to which the employees cannot waiver the rights awarded to them by law.

In case the indexations and/or increases do not cover the full rate of inflation, the equivalent value of the salary rights will be updated at the level of the inflation. In the calculation of the compensation the equivalent value of the meal tickets is included.

The duration of time for which compensations are granted differs with respect to the following situations:

- if the employee requests, through the petition to call to court, that the parties be reset to their prior situation, hence the rehiring, the compensations will be granted from the date of the unlawful dismissal and subsequent to the rendering of the irrevocable court decision, until the actual enforcement of the decision;
- if the employee requests only the payment of compensations and not the resetting in the previous situation, respectively rehiring, through the irrevocable court decision, favorable to the employee, his/her employment contract will be rightfully terminated and the former employee will be entitled to receive the compensations calculated from the date of dismissal and until the moment of the recourse court’s decision.

We believe that, as indicated in the specialty legal literature (Țiclea, 2014; Ștefănescu, 2014), in the case regulated by art. 80 para. (1) of the Labour Code, *moral compensations* may also be granted (on the grounds of art. 253 para. (1) of the Labour Code).

Probably the most important consequence of annulling the dismissal decision and of resetting the parties in the prior situation consists in the rehiring of the employee.

Reintegration (rehiring) presupposes the resuming of the function held previously, in the same position or a similar position, on the grounds of the old employment contract, as well as the passing of work seniority as though the contract had never been interrupted.

According to art. 274 of the Labour Code, “the decisions rendered in the first court are final and executory”, means that from the date of rendering such as decision, the matter of rehiring can be raised. In practice, relevant is not the date of rendering the court order, but the date of writing and communicating the court order, which will be requested by the employer in order to proceed with the rehiring. The law does not establish a period during which the employee must request, either directly or through the officer of the court, the resuming of the activity.

According to art. 262 of the Labour Code, “not executing a final court order regarding the rehiring of an employee constitutes a criminal offence”, but the non-existence of a legal term during which this obligation must be fulfilled makes this text of law difficult to apply (Popescu, 2008). Hence, art. 6 of the Convention refers to the observance of a *reasonable term*, which differs from case to case, for the enforcement of a final (and irrevocable) court order.

We consider that in case of rehiring an employee who was dismissed unlawfully or without grounds, no decision of the employer is necessary in order to reset the employee to the position held previously, because in this sense the authority of judged matter of the court order operates in this case.

In reality, in very many cases, the employers refuse or postpone the enforcement of the court order regarding the petition count referring to rehiring to the same position, on the grounds that the position was canceled (it does not exist anymore). For this reason, the European Court of Human Rights was notified in many cases¹, and decided against Romania, deciding that the canceling of the position does not remove the obligation to rehire the person, by creating an *equivalent or similar position* to the position held before. By *equivalent or similar position* must be understood a position comprising:

- the same professional qualification;
- similar work duties and responsibilities;
- salary at least equal to the one had before.

In the view of the European Court of Human Rights, the *plaintiff* rehiring to an equivalent position to the one held before his/her dismissal, the payment of the amounts ordered through the court order of reinstatement, reupdated depending on the inflation, as well as the payment of compensations for the material and moral damages suffered due to not enforcing the respective decision, would put the plaintiff, to the highest extent possible, in a situation equivalent to the one in which he/she would have been if the requirements of art. 6 para. (1) of the Convention, regarding the right to a fair trial, would not have been violated (matter *Ștefănescu*, point 37 of the Decision of 11 October 2007).

In all cases, the Court reminded that the enforcement of a decision to rehire must be considered as being an integral part of the trial, in the sense of art. 6 of the Convention, such as the *right to have access to justice, would be illusory if the domestic legal order of a state would allow that a final and mandatory court order would remain not enforced, to the detriment of a party*. That is why “the state, as depositary of the public force, is called to manifest diligent behavior and assist the creditor in executing the decision favorable to him/her” (matter *Strungariu*, Decision of 29 September 2005).

The employer cannot oppose the execution of the court order regarding the rehiring by invoking the fact that throughout the litigation regarding the dismissal the employee took a job with another employer. The existence of another individual employment contract for the same period cannot stop the enforcement of a final court order because the right to work established in art. 3 of the Labour Code, which must be corroborated cu art. 35 of the Labour Code regarding the accumulation of positions, would be restricted.

Our domestic legislation also regulates a series of special measures, as follows:

- according to art. 17 para. (1) of Law no. 76/2002 regarding the system of unemployment security and the stimulation of employment, the persons in a situation where the rehiring ordered “through final court order

¹ See: matter *Ghibuși* (Decision of 23 June 2006, published in the Official Gazette no. 700 of 16 August 2006); matter *Strungariu* (Decision of 29 September 2005, published in the Official Gazette no. 415 of 3 June 2008); matter *Ștefănescu* (Decision of 29 September 2005, published in the Official Gazette no. 617 of 22 August 2008); matter *Cone* (Decision of 24 June 2008, published in the ECHR Bulletin no. 8/2008, pp. 62-68); matter *Oceanu* (Decision of 29 June 2008, in ECHR Bulletin no. 9-10/2008, pp. 66-71); matter *Teodorescu* (Decision of 29 July 2008, published in the Official Gazette no. 386 of 9 June 2009); matter *Colceru* (Decision of 28 July 2009, published in the Official Gazette no. 66 of 29 January 2010).

is no longer possible within the entities where they had worked before, due to the final cease of activity, or within the entities which took over their patrimony” are considered unemployed persons and have the right to unemployment aid;

- according to art. 43 para. (2) of Law no. 202/2002 regarding the equal opportunities and equal treatment between men and women¹, it is regulated that “if the rehiring is no longer possible within the entity or the workplace of the person for whom the court of law decided that the work relations or conditions had been modified unilaterally and unjustified by the employer, the employer will pay the employee a compensation equal to the real damage suffered by the employee”.

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¹ Republished in the Official Gazette no. 150 of 1 March 2007.