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**Employer Responsibilities in Moral
Harassment Claims under the Romanian Legislation**

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Abstract: This paper addresses the grey legal area of moral harassment at work under the Romanian legislation, with a focus on employer responsibilities deriving from claims grounded on such discrimination deed. It puts under spot light an issue that Romanian employers confront with on a daily basis and which has not been analysed and conceptualized up to the present. The author has relied on previous research she conducted with respect to moral harassment at work, with the aim to build legislative propositions to be further considered during the legislative process. The research outlines the currently applicable legal framework in Romania, as well as the *status quo* of the files submitted with the courts of law addressing moral harassment at work. The paper synthesises the conclusions of the observations made throughout the last 4 years in practice (court procedure). This paper highlights that, despite the efforts undertaken by the Romanian legislator in order to ensure protection of employees at work, the concept of “moral harassment at work” does not benefit from any regulation under the Romanian legislation. As a paradox, there is an outstanding number of court files initiated by (former) employees against their employers, grounded on mobbing, that usually go through the two-stage trial procedure (first phase of judgement and appeal), thus determining the courts of law to frame the concept of moral harassment at work based on related legal concepts (discrimination, harassment, psychological harassment). The study has implications for researchers, employees and employers, students and academics. This paper stands out as a first legal and practice research on the topic of employer responsibilities in moral harassment claims under the Romanian legislation.

Keywords: mobbing; Romania; discrimination

JEL Classification: K31; K49

1 Introduction

The Romanian labour legislation has been conceived and projected to confer employees the highest degree of protection possible. Considering the juridical inequality that exists between the employee and the employer, in the context where the concept of subordination characterises the employment relationship, the employee is presumed to be the “weak” joint of the employment chain and, thus, the contractual party that must be safeguarded and harboured through the Romanian legislator’s efforts. As a historical background, this approach was initiated in 2003, once with the adoption and enforcement of the Law no. 53/2003 – the Romanian Labour Code, that – although amended and completed for over 30 times – is currently in force. Up to that moment in time, employees’ protection was illusory and non-effective, being regulated through a normative act adopted by the communist regime, *i.e.*, Law no. 10/1972 – the Labour Code of the Socialist Republic of Romania.

The extensive care of the Romanian legislator with respect to the protection that employees should benefit from in connection with their employment has generated and led to a “pendulum effect” in as

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much employers are concerned. Essentially, from employers' perspective, the Romanian labour legislation could be synthesized as a set of strict rules to be observed and obligations to be complied with, under a severe sanction regime. The risk of non-compliance or improper-compliance is generally high and is particularly increased in matters which are in a legal grey zone. This is also the case of moral harassment at work.

2 Moral Harassment at Work under the Romanian Legislation – Legal Grey Zone

Recent studies have shown that harassment in workplaces is not considered a major issue in Romania, low levels of reporting of harassment by workers being registered at country level mainly due to low level of awareness (Eurofound, 2015).

The conclusions of the aforementioned studies are partially confirmed by the current legislative status of the legislation addressing harassment at work. Specifically, the concept of “moral harassment at work” does not benefit from any regulation under the Romanian legislation. However, we must stress that the low levels of reporting of harassment by workers derives from the lack of reporting procedures implemented at company level. In the context where workers don't have a procedural support to address the harassment issue directly with the employer, at company level, they seek for resolution with the courts of law. In practice, there is an outstanding number of court files initiated by (former) employees against their employers, that usually go through the two-stage trial procedure (first phase of judgement and appeal). The economic crisis, the political unstable climate and the permanent shrinking of the Romanian economy have had a significant influence on this effect.

The concept of “moral harassment at work” is rather a grey zone under the Romanian legislation. Essentially, there are no legal provisions to specifically address this matter, but only general provisions aimed to prevent and sanction discrimination deeds. After a 15-years effort of the Romanian legislator, psychological harassment was first defined and expressly regulated by the Romanian legislation in 2015. Still, it does not address the employment relationship and it does not respond to the current needs of the workers facing such issues at their workplaces.

A brief analysis of the Romanian legislation reveals that concepts such as “discrimination”, “direct discrimination”, “indirect discrimination”, “harassment” and “psychological harassment” benefit from a legal definition. Every time an employer, a worker and/or a court of law faces a “moral harassment at work” matter, it has to merge, corroborate and make interpretation of the above indicated definitions in order to determine the context and extent to which the subject employee is under legal protection.

To sum up, at present, the relevant Romanian legislative framework regarding moral harassment at work consists of the following 4 (four) normative acts:

[1] Labour Code of Romania¹

As mentioned above, the Labour Code of Romania was adopted and enforced in 2003, transposing at that time the great majority of the relevant EU Directives applicable in the labour law field (as part of the EU pre-accession efforts). Although in August 2017 the Labour Code of Romania had undergone its 30th amendment and completion, no adjustments have been operated therewith in connection to (moral/psychological) harassment at work that workers may deal with during employment.

¹ Law no. 53/2003 on the Labour Code, published in the Official Gazette of Romania Part I, no. 345 dated 18.05.2011 (republished), as further amended and completed (hereinafter the “**Labour Code of Romania**”).

Specifically, the Labour Code of Romania addresses the principle of equality of treatment of all employees as a fundamental guideline upon which employment relationships shall be construed, without tackling the specific forms of discrimination. As per the provisions of Labour Code of Romania (Article 5 para. (1) of the Labour Code of Romania), within the framework of work relations, the principle of the equality of treatment for all employees and employers shall apply and any direct or indirect discrimination against an employee, based on criteria such as sex, sexual orientation, genetic characteristics, age, national origin, race, colour of the skin, ethnic origin, religion, political options, social origin, disability, family conditions or responsibilities, union membership or activity, shall be prohibited.

Following the same line of reasoning, the Labour Code of Romania strictly defines direct and indirect discrimination, as follows:

- a) “direct discrimination” is defined as any actions and facts of exclusion, differentiation, restriction, or preference, based on one or several of the criteria mentioned above, the purpose or effect of which is the failure to grant, the restriction or rejection of the recognition, use, or exercise of the rights stipulated in the labour legislation (Article 5 para. (3) of the Labour Code of Romania);
- b) “indirect discrimination” is defined as any actions and facts apparently based on other criteria than those mentioned above, but which cause the effects of a direct discrimination to take place (Article 5 para. (4) of the Labour Code of Romania).

It is for the Romanian courts of law to decide which provision is applicable to moral harassment deeds occurred at the workplace, on a case-by-case analysis.

[2] Government Ordinance no. 137/2000 regarding the prevention and the sanctioning of all discrimination forms¹

“Discrimination” and “harassment” were first regulated in Romania in 2000, through the Government Ordinance no. 137/2000. Article 2 para. (1) establishes the definition of discrimination as “any distinction, exclusion, restriction or preference based on race, nationality, ethnicity, language, religion, social status, belief, sex, sexual orientation, age, disability, non-contagious chronic disease, HIV infection, membership of a disadvantaged group and any other criteria which has the purpose or the effect of restriction, elimination of recognition, use or exercise of fundamental human rights and freedoms or of rights recognized by the law in the political, economic, social or cultural field or in any other field of public life.” Furthermore, any behaviour on grounds of race, nationality, ethnicity, language, religion, social class, creed, gender, sexual orientation, membership in a disadvantaged group, age, disability, refugee or asylum status or any other criterion leading to the developing of an intimidating, hostile, degrading or offensive setting is deemed as harassment (Article 2 para. (5) of the Government Ordinance no. 137/2000).

Pursuant to the provisions of the Government Ordinance no. 137/2000, any harassment deed is deemed an administrative offence and shall be sanctioned with a fine ranging from approx. EUR 250 to approx. EUR 7,500, in case a natural person commits the harassment deed, respectively with a fine ranging from approx. EUR 500 to approx. EUR 25,000, in case the harassment deed is committed to a group of persons or to a certain community. In addition, the law entitled the Romanian National Council for Combating Discrimination or the relevant court of law, as the case may be, to oblige the party who committed the

¹ Government Ordinance no. 137/2000 regarding the prevention and the sanctioning of all discrimination forms, republished with the Official Gazette of Romania Part I, no. 166 dated 07.03.2014 (hereinafter the “**Government Ordinance no. 137/2000**”).

harassment deed to disseminate, using mass media channels, a synopsis of the sanctioning decision issued by the Romanian National Council for Combating Discrimination or by the relevant court of law, as the case.

[3] Law no. 202/2002 on equal opportunities between women and men¹

The aim of Law no. 202/2002 is to provide the relevant measures necessary to promote the principle of equal chances and treatment between women and men with the purpose to eliminate all the forms of discrimination based on sex from the public relationship and especially from employment relationship, as stated in its preamble.

In 2015, the Law no. 202/2002 was extensively amended and completed, the main novelty being the regulation of “psychological harassment” for the first time under the Romanian law. Essentially, “psychological harassment” is defined as any inappropriate behaviour that takes place in a certain period of time, repetitively and systematically, and which implies a physical, oral or written behaviour, gestures or other international acts and which may affect the personality, the dignity or the physical integrity of a person (Article 4 letter d¹ of Law no. 202/2002). The definition provided by the law is arguable and too vague, making no distinction between the types of behaviours that may be deemed as moral (psychological) harassment, and too confusing, in the sense that it does not cover the situation where a single act of psychological harassment is committed (and not a repetitive one) (Popescu & Popa, 2016).

[4] Criminal Code of Romania²

The Criminal Code of Romania defines “harassment” strictly from the perspective of a physically-focused deed (stalking), without setting any legal implications with respect to moral harassment (at work or in any other context). Otherwise saying, under the Romanian law, psychological harassment is not deemed as a criminal deed.

3 Employer Legal Responsibilities regarding Potential Acts of Moral Harassment at the Workplace – before Court Action

In practical terms, victims of moral harassment at work suffer from stress at work or due to work, resulting from bullying actions exerted either vertically (from superiors or from inferiors) or horizontally (from same-ranked colleagues). Otherwise saying, the aggressor is not the employer itself (*i.e.*, the company), but the superiors, inferiors or same-status colleagues of the victim.

There are three key questions to be answered in relation to the above: (1) Does the employer have any responsibility for the deeds committed at work by its employees towards other employees? (2) What are the steps to be followed and procedures to be implemented by employers in order to ensure compliance with the (vague) applicable legal framework, before workers initiate any court actions with respect to the moral harassment deeds they were subject to? and (3) Are there any other means available to employers that would allow them to mitigate the risks derived from moral harassment deeds occurred at the workplace?

To answer question (1), note is to be made that – under the Labour Code of Romania – the employer is held responsible for any material damage incurred to any of its employees during the course of the job

¹ Law no. 202/2002 on equal opportunities between women and men, republished with the Official Gazette of Romania Part I, no. 326 dated 05.06.2013, as further amended and completed (hereinafter the “**Law no. 202/2002**”).

² Law no. 286/2009 on the Criminal Code, published with the Official Gazette of Romania Part I, no. 510 dated 24.07.2009, as further amended and completed (hereinafter the “**Criminal Code of Romania**”).

or in relation to the job (also called «liability for material damage»). Essentially, as a general rule, the employer shall, on the basis of the rules and principles of contractual civil liability, compensate the employee in case he/she suffered a material damage as a result of employer's fault, during the course of the job or other tasks related to the job (Article 253 para (1) of the Labour Code of Romania). Therefore, the lack of any support at company level for the employees that are victims of moral harassment at work deeds (*e.g.*, reporting moral harassment at work committed by another employee, followed by the inaction of the employer; no response provided by the employer to the employee who requested support in relation to moral harassment deeds occurred at the workplace; inexistence of any measures implemented by employers in order to solve the harassment situation occurred at work etc.) shall inevitably engage the liability of the employer with respect to the consequences incurred by the victim employees. In conclusion, the employer is held responsible, under the law, for the moral harassment deeds committed at work by its employees towards other employees.

With respect to question (2), in the context where – as shown above – the employer is held responsible for the moral harassment deeds committed at work by its management and/or by its executive and non-executive employees, one may conclude that the employer has its own stake in preventing and sanctioning moral harassment at work. Practice reveals that a small number of employers understand the significance of such approach, as well as the role of the internal sanctions that could diminish or even eliminate moral harassment at work.

In the Romanian legal system, sanctions are attributed with three main characteristics (functions/roles): (i) an educative role, aimed to ensure acknowledgement of the potential implications that an inappropriate behaviour may have, (ii) a preventive role, aiming to anticipate the negative consequences derived from committing deeds or acts that affect rights or values, and (iii) a remedy role, focused on the correction of the inequities that the victim was subject to.

From this perspective, the internal regulation - that any employer has the legal obligation to draw-up and implement at company level - entitles the employer to proceed with two sets of actions: firstly, to implement a reporting procedure, including a “whistle-blower procedure”, that could ensure that all moral harassment incidents are revealed and placed under spot light, and secondly, to establish the sanctions that it may appreciate necessary in order to mitigate the risks of moral harassment at work. Thus, in order to ensure compliance with the (vague) applicable legal framework, before workers initiate any court actions with respect to the moral harassment deeds they were subject to, employers should project their internal regulations as an efficient and effective tool against potential discrimination actions, following the legal guidelines indicated here below:

- employers have the obligation to set, within their internal regulations, disciplinary sanctions, with the observance of the limits provided by the applicable law, for all employees that breach the right to dignity of other employees by creating degrading, intimidating, hostility or offensive environments, through discrimination deeds (Article 8 letter b) of Law no. 202/2002);
- employers have the right to establish rules for the observance of the non-discrimination principle applicable at the workplace, specific rules regarding work discipline, as well as disciplinary sanctions (Article 242 of the Labour Code of Romania);
- employers have the right to assess the existence of disciplinary misconducts and to apply the corresponding disciplinary sanctions, as per the law, the applicable collective labour agreement and the internal regulation (Article 40 of the Labour Code of Romania).

To conclude, the internal regulation proves to be a powerful and effective tool to be used at company level in order to diminish and/or eliminate the incidence of moral harassment deeds at work.

To answer question (3), we shall rely on the Draft National Strategy “Equality, inclusion, diversity” for the period 2018 – 2022, publicly released by the Romanian National Council for Combating Discrimination on 26 September 2017, to be further approved by means of Government Decision (Romanian National Council for Combating Discrimination²⁰¹⁷)¹.

According to the aforementioned document, one of the strategic areas of intervention shall consist in “equality and non-discrimination on the labour market in terms of hiring and profession”, the proposed measures consisting in:

- Elaboration of conduct codes by employers from both public and private sector, regarding the combating of discrimination, harassment and mobbing, which shall be mandatorily filed with the relevant territorial labour inspectorate;
- Elaboration by the Romanian National Council for Combating Discrimination of methodological norms reflecting a proper mechanism for reporting discriminatory behaviours and attitudes at workplaces, to be addressed to any public institution, irrespective of the size of its personnel, as well as to any private employer having at least 50 employees;
- Imposing the obligation of employers to train all personnel, upon the moment of employment, with respect to the prevention and combating of discrimination, harassment and mobbing at work;
- Including in the individual labour agreement the obligation of the employer with respect to the proper observance of the worker’s right to equality and non-discrimination, as well as relevant provisions related to harassment and mobbing and reporting mechanisms that are available to employees.

In the light of the above, other means available to employers that would allow them to mitigate the risks derived from moral harassment deeds occurred at the workplace could consist in: (i) drawing-up and implementation of conduct codes (having the same force and applicability as internal regulations), (ii) training of personnel, (iii) awareness provisions included in the individual labour agreements with respect to the content and implications of mobbing at work, as well as (iv) the development and implementation of internal reporting mechanisms, that would enable the employer to gain knowledge of and solve the conflicting situations that derive from moral harassment deeds.

4 Employer Responsibilities Regarding Moral Harassment Claims Brought To Court

Having in mind that, under the Romanian laws, the employer is held responsible for the moral harassment deeds committed at work by its management and/or by its executive and non-executive employees, note is to be made that court actions are filed by workers against the employers (and not against the aggressor-workers). The employer stands in trial and, in case the court of law decides in favour of the claimant worker, then the employer has the legal right and possibility to regress against the aggressor worker.

¹ Draft Government Decision for the approval of the National Strategy “Equality, inclusion, diversity” for the period 2018 – 2022. Retrieved from <http://cncd.org.ro/proiect-strategie-eid-2018-2022>, date: 28.09.2017.

Litigations deriving from moral harassment deeds committed at work have serious impact on employers: firstly, the company faces a reputational risk (which is deemed as more devastating than any pecuniary risk); secondly, court actions usually go through the two-stage trial procedure (first phase of judgement and appeal), process which has serious time and costs implications on the company; thirdly, a lost case shall always be regarded by the company as a “negative precedent” that could encourage other employees to seek resolution in court.

As per the provisions of the Romanian laws, litigations deriving from moral harassment deeds committed at work are qualified as “labour law litigations” and are subject to the competency of the Tribunals (first instance) and Courts of Appeal (appeal phase). Following the same focus of ensuring workers’ protection, the Romanian legislator provides that workers’ access to court has to be free of charge, no judiciary stamp fee or any other related fee being applicable. This facility partially explains the outstanding number of number of court files initiated by (former) employees against their employers on moral harassment grounds.

Furthermore, according to the Labour Code of Romania, labour law litigations need to be solved by the courts of law in emergency procedure and hearing terms have to be scheduled no later than 15 days one after another. Although these provisions are not observed in practice, as it is practically impossible for the courts of law to comply given the significant number of court files submitted for trial, labour law litigations benefit from a more urgent trial procedure than any other types of litigations (*e.g.*, civil litigations, public procurement litigations etc.).

In terms of specific responsibilities of employers regarding moral harassment claims brought to court, the burden of proof stands out as the most restrictive. By way of explanation, as per the provisions of the Labour Code of Romania, the burden of proof in labour law litigations lies with the employer, irrespective if the claimant party is the employer or an employee. Otherwise saying, in labour law litigations grounded on moral harassment at work, it is for the employer to prove that no such discrimination deed has been committed at the workplace by the superiors, inferiors or same-status colleagues of the claimant worker.

In many cases, employees address to the courts of law seeking to obtain damages for acts like: being ridiculed by co-worker/several co-workers, being professionally discredited by co-worker/several co-workers, being approached by a colleague in an un-professional and impolite manner, being subject to rumours initiated by co-worker/several co-workers, irrespective of such rumours related to professional and/or private life aspects. Under these circumstances, it is self-understood that the employers’ degree of exposure in court is high and the risk of not being able to provide relevant pieces of evidence cannot be easily mitigated.

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