CERTAIN CONSIDERATIONS ABOUT THE RIGHT TO WORK AND THE REINSTATEMENT OF AN EMPLOYEE AFTER UNLAWFUL DISMISSAL

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Abstract

The consequences of finding by a court of law that the decision to dismiss an employee is void, are to annul with retroactive effect the measure terminating the employment relationship between the parties (i.e. the applicant and the employer) and to restore the previous situation.

According to the retroactivity principle of the effects of the legal act nullity - nullity does not produce effects only for the future (ex nunc), but also for the past (ex tunc), i.e. these effects are produced up to the moment of the conclusion of the civil legal act.

The most important consequence of the annulment of the dismissal decision and the reinstatement of the previous situation is the effective reinstatement in employment.

Reinstatement means the continuation of the old employment agreement (without changing its provisions - including the place of work or salary), by resuming the position previously held.

In this study we shall tackle down certain considerations regarding the proper reinstatement of an employee, without breaching his or her legal rights, including the right to work.

Keywords: *right to work, reinstatement, employee, employer, unlawful dismissal.*

1. About right to work

According to human rights classifications, the right to work is included in the category of economic and social rights, along with the right to equal pay for equal work, the right to safety and health at work, the right to paid leave, the right to social security, the right to health (which implies the right of a person to enjoy the highest attainable standard of physical and mental health)[1].

These economic and social rights are considered *second-generation rights*, which require positive intervention by states to create the material and social conditions necessary for their realisation.

From the point of view of the content of the obligation to respect and guarantee which is incumbent on States, the right to work falls into the category of virtual rights which are characterised by the fact that they do not enjoy the full force of an authority effectively sanctioned by law.

2. Preliminary considerations on the invalidity of the dismissal decision and reinstatement of employees in Romania

Art. 80 of the Romanian Labour Code states that:

„(1) If the dismissal has been unfairly or unlawfully effected, the court shall order its annulment and shall oblige the employer to pay compensation equal to the indexed, increased and updated salaries and other rights which the employee would have enjoyed.

(2) At the request of the employee, the court which ordered the dismissal to be annulled shall restore the parties to the situation prior to the issue of the dismissal.

(3) If the employee does not request the reinstatement of the situation prior to the dismissal, the individual employment agreement shall be terminated automatically on the date of the final and irrevocable judgment.".

In recent years there has been considerable debate over the constitutionality of art. 80 para. (1) of the Labour Code [former art. 78 para. (1) of the same piece of law] providing the annulment of the dismissal by the court of law and the award of damages, and the CCR dismissed the non-constitutionality exception through

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[1] LSN, PIDO, pp. 12 and 31.

several decisions[2], by underlying three things in particular. *Firstly*, the employee has suffered actual loss through deprivation of his or her salary to which he or she was entitled, regardless of whether or not, between the time of dismissal and the time of re-employment, he or she earned or not income from other sources[3]. *Secondly*, the termination of the employment agreement in breach of the legal conditions is an objective and reasonable cause which allows on the one hand the restriction of economic freedom and, on the other hand, the restriction of the right to property. *Thirdly*, the analysed legal provision does not prevent free access to justice, as the parties can benefit from all procedural guarantees to uphold their rights.

Otherwise, as the doctrine emphasizes „it is obvious that the dismissal institution does not breach the right to work and the freedom of work. The employee does not benefit of an absolute liberty in this quality, and the right of the employer to dismiss him/her can not be removed"[4].

Moreover, through the Decision no. 243/2016[5], the Romanian Constitutional Court once declared that the legal text is constitutional, underlying that „the nullity of a legal act returns the parties to the situation in which they were before that act came into existence, so the rule of reinstatement applies. (…) Reinstatement to the previous situation can be achieved in two ways specific to labour law, namely by reinstatement of the employee and payment by the employer of compensation equal to the indexed, increased and updated salaries and other rights that the employee would have benefited from, or only by paying this compensation. Thus, the annulment of the dismissal measure must be accompanied by the payment of the compensation referred to above and, optionally, at the request of the employee, by his or her reinstatement."[6].

Please note that this compensation is awarded in full if the employee was not at fault, because if there were concurrent faults, the employer would be obliged to pay to the employee only a part of the compensation corresponding to his or her fault.

The consequences of finding that the decision to dismiss an employee was void are to annul with retroactive effect the measure terminating the employment relationship between the parties (*i.e.* the employee and the employer) and to restore the previous situation.

Nullity does not produce effects only for the future (*ex nunc*), but also for the past (*ex tunc*), *i.e.* these effects are produced up to the moment of the conclusion of the civil legal act.

The most important consequence of the annulment of the dismissal decision and the reinstatement of the previous situation is the effective reinstatement in employment, if expressly requested by the employee in front of the court of law. Please note that "if the employee has not applied for reinstatement through the dismissal challenge, he or she can still apply for reinstatement, according to art. 204 para. (1) of the Code of Civil Procedure, until "the first term at which he/she is legally summoned", after which operates the forfeiture of the right to invoke art. 80 para. (2) of the Labour Code, both in the present case and in a subsequent case."[7].

Reinstatement means the continuation of the old employment agreement (without changing its provisions - including the place of work or salary), by resuming the position previously held.

From our perspective, reinstatement could be also applicable to *de facto* dismissals, when employees are no longer accepted at work by the employers, without being issued dismissal decisions – would it be any other solution than the one to demand in front of the competent court of law damages and reinstatement?

3. Effective reintegration of the employees

According to art. 17 of the Romanian Labour Code, the function/occupation according to the specification of the Romanian Classification of Occupations or other normative acts, which is reflected in the job description, specifying the duties of the job, as well as the place of work are essential clauses of the individual employment agreement, which are agreed between the employer and the employee. The individual employment agreement can only be amended in these respects by agreement between the parties.

Although the reinstatement of the parties to the previous situation *does not require* the conclusion of a new individual employment agreement or the issue of a reinstatement decision, we recommend that the employer issue a reinstatement decision for the

[2] For instance the Decision no. 318/2007 published in the Official Gazette of Romania no. 292 of 3 May 2007, the Decision no. 1241/2010, published in the Official Gazette of Romania no. 848 of 17 December 2010, the Decision no. 290/2013 published in the Official Gazette of Romania no. 383 of 27 June 2013.

[3] Certain exceptions can be deduced from the law (*e.g.* in case of parental leave allowance, when the employee is entitled only to the allowance, not also to a salary), otherwise an abuse of the employee's right to obtain damages could be taken into consideration.

[4] Alexandru Țiclea, Laura Georgescu, *Dreptul muncii. Curs universitar*, 7th ed. revised and supplemented, Universul Juridic Publishing House, Bucharest, 2020, p. 420.

[5] Published in the Official Gazette of Romania no. 495 of 1 July 2016.

[6] Para. 17 of the Decision.

[7] Ion Traian Ștefănescu, *Tratat teoretic și practic de drept al muncii*, 4th ed., revised and supplemented, Universul Juridic Publishing House, Bucharest, 2017, p. 535.

employee, stating the post to which he or she will be reinstated and the date on which he or she will return to work.

It should be noted that the employee's consent is not required for the reinstatement decision to be issued, but that he or she has the right to appeal.

From our perspective, normally, the question of an employee's reinstatement should be analysed from two perspectives:

i. Reinstatement to the post and position held prior to the dismissal

Following the interpretation of art. 80 of the Romanian Labour Code, we note *ab initio* that the legal provision does not distinguish whether the post to which reinstatement is to be ordered still exists or not.

If there is no vacancy in the specialized department of the employer, in the position held by the employee before his or her dismissal, difficulties may arise. In such situations, we recommend to take steps to change the organisation chart as soon as possible and keep the employee informed of the progress of these steps.

If it has become impossible to perform in kind (reinstatement in the post and position held prior to the dismissal), the employer should order reinstatement in an equivalent post, as indicated below.

ii. Reinstatement to a post equivalent to that held before the dismissal

According to the legal doctrine, such an equivalent post requires the cumulative fulfilment of several conditions:

a. the same or a similar professional qualification;

b. similar duties and responsibilities;

c. salary at least equal to the one previously held.

Furthermore, we would point out that the job title could be the same or different, and the post could be in another directorate, department or component unit, but with the same salary as before the dismissal.

In view of the fact that the European Court of Human Rights has ruled in several cases on the issue of reinstatement to an equivalent post, we consider it necessary to point out the following:

"The Court considers that the reinstatement of the applicant in a post equivalent to that held before his/her dismissal, the payment of the sums ordered by the decision of 1 February 1999, updated for inflation, and the payment of compensation for the material and non-material damage suffered as a result of the failure to comply with that decision would, as far as possible, place the applicant in a situation equivalent to that in which he would have found himself/herself if the requirements of art. 6 (1) of the Convention had not been infringed.".

Please bear in mind that if the resumption of the employment relationship is made under different conditions than before (*e.g.* lower salary, change of function or place of work), the employee would have the possibility to consider these changes unlawful and to challenge them, but not to simply refuse to report for work and resume work.

4. Additional recommendations

In view of the practical problems arising from the effective reinstatement of the employees, each time we deal with judicial proceedings, if the reasoning of the court is not clear, it should be considered necessary to submit a request for clarification of the operative part of the civil judgment delivered in the respective case.

Depending on the clarification of the sentence, we could also consider together the appropriateness of suspending the provisional execution of the sentence (pursuant to art. 450 of the Romanian Code of Civil Procedure), since the immediate execution of the sentence is difficult and could have serious effects, or, in the event of the appeal being admitted, the return of the execution would be particularly difficult, and the failure of this procedure would cause considerable damage to the employer, which would be difficult to repair. This institution makes it possible to suspend the enforceability of the judgment until the appeal has been decided.

At the same time, during the whole procedure, in order not to be accused of not fulfilling the obligations established by the civil court (which cannot be justified by the fact that the workplace has been abolished or reorganization measures have intervened), we recommend that the employer proceeds to:

a. maintain a permanent dialogue with the employee (*e.g.* addresses, notifications, invitation to undergo compulsory occupational medical check-up, if necessary, meetings) and ask him or her to report to work, even if he or she will be offered a job equivalent to the job he or she previously had;

b. calculate and pay compensation equal to the indexed, increased and updated salary and other rights to which he or she would have been entitled from the date of dismissal to the date of actual reinstatement.

5. Failure to execute the reinstatement decision

After the reinstatement decision has been issued, if the employee fails to report for work, disciplinary proceedings may be brought against him or her with all their consequences. How should the employer solve this issue?

Taking into account the provisions of art. 287 para. (1) letter d) of the Romanian Criminal Code, which stipulates that failure to comply with the court

order for reinstatement to work constitutes a criminal offence and is punishable by imprisonment from 3 months to 2 years or a fine, the employer should immediately notify the employee. This specific notification must stipulate that the employee's place of work is at his or her disposal for a certain period of time and that, if he or she fails to report for work, he or she could be subject to disciplinary action (including disciplinary dismissal for unjustified absence). In order to be pro-active, the employer found in such situation could resort to another alternative - to require the former employee, through the same notification, to state whether he or she waives the application of the court decision in terms of reinstatement.

If the employer fails to comply with the reinstatement order, then the employee could seek to enforce the judgment. With regard to the enforcement of the judgment, as well as its prescription, the labour legislation does not establish special rules, which is why the general rules of the civil procedural law will apply (*i.e.* art. 706-711 of the Code of Civil Procedure). The labour courts, as a rule, apply in such cases to the employer the penalty established per day of delay, based on art. 907 of the Code of Civil Procedure[8].

Moreover, in practice appear cases of partial or total impossibility of executing the reinstatement decision, when the employer is exempted of responsibility (*e.g.* in the case of the final sentence of the employee to the execution of a custodial sentence, prohibition to exercise the profession by a final decision of the criminal court, expiry of the term of the individual employment agreement concluded for a fixed term, effective termination of the job in which the employee was supposed to be reintegrated, the employee is remanded in custody). As the legal doctrine states "in such conditions, the reinstatement obligation cannot be executed not even virtually and not for a single moment."[9].

6. Concluding Remarks

Even though the employees do not benefit of an absolute freedom, for their protection, the Romanian Labour Code foresees expressly and limitatively the situations in which employees may be dismissed and the procedure to be followed, in order to protect them of certain abuses and to guarantee their rights.

As emphasized in the legal doctrine, "the restrictive definition of the cases and reasons for which legal employment relationships may be terminated at the unilateral will of the employer is the most important guarantee for the non-infringement of the right to work"[10].

The Romanian Labour Code is very protective with the employees, reason why in art. 38 of this piece of law, it states that employees cannot even waive their rights established by law, any such transaction being null.

In cases of dismissals made in breach of the labour legislation, there are two possible solutions in case the employee wants to contest the dismissal decision. First solution is revocation, second solution is annulment of the dismissal decision decided by the court of law.

Revocation of the dismissal decision could also be a solution for an employer who acknowledges that the law has been violated. The revocation is possible because the dismissal decision is a unilateral act of the employer, who, in this situation, reverses its earlier decision and repeals with retroactive effect that decision. The revocation must be done by the same body of the organization that the one which disposed the dismissal, and it must be done in writing.

The annulment of the dismissal decision decided by the court of law is the most common form of reparation for the harm done in such cases. But, in practice, many problems appear in case of dismissals. For instance, the situation when, after the dismissal, the employer is dissolved, and a new entity takes over its patrimony, being the successor of the respective entity – should the successor be responsible for the breach of the legal procedure?

Questions like what happens in case of reinstatement of employees in such cases, for sure attracts many attention and carefulness. From our perspective, we consider that the legal provision is outdated and the legislator ignores the reality of our times. The legal provision should be amended, as underlined by the labour specialists, with whom we totally agree, at least in the following aspects:

- "accepting the removal of the imperative character of the text with a dispositive wording to the effect that the court "may restore the parties to their previous position";
- expressly recognising the right of the court to order the reinstatement of the employee in an equivalent or similar position;
- the obligation to return to work, which has become impossible, may be replaced by equivalent performance, *i.e.* by the award of (additional)

[8] *I.e.* Who states that "No liquidated damages may be awarded for non-performance of obligations under this Chapter".

[9] Ion Traian Ștefănescu, *Tratat teoretic și practic de drept al muncii*, 4th ed., revised and supplemented, Universul Juridic Publishing House, Bucharest, 2017, p. 537.

[10] Alexandru Țiclea, Laura Georgescu, *Dreptul muncii. Curs universitar*, 7th ed., revised and supplemented, Universul Juridic Publishing House, Bucharest, 2020, p. 420.

compensation."[11].

For sure, the judicial practice is more pitoresque than the legislator could have imagined when creating the legal norm…

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