CONSIDERATIONS REGARDING CLASSIFICATION AS JOBS PERFORMED IN SPECIAL WORKING CONDITIONS OF THE JOBS CARRIED OUT BY THE STAFF OF THE ANATOMIC PATHOLOGY AND FORENSIC DEPARTMENTS WITHIN LEGAL MEDICINE INSTITUTIONS

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Abstract

This paper focuses on issues dealing with inclusion under the difficult working conditions regime of the jobs carried out by the staff of the Anatomic Pathology and Forensic Departments within legal medicine institutions, following adjudication as unconstitutional of the legislative solution referred to in art. 22 of Law no. 104/2003 on the handling of human corpses and the harvesting of organs and tissues from corpses for transplantation purposes, republished, under CCR dec. no. 53/2020. Analyzing the tortuous evolution of the laws and regulations applicable in the matter under consideration, this paper seeks to clarify the issue of bringing under the difficult working conditions regime the jobs done by the personnel working in the anatomical pathology and forensic departments of the legal medicine institutions, in comparison with the personnel carrying out identical jobs within hospitals and with the staff of the Cellular Biology, Anatomy, Histology and Pathological Anatomy departments within universities. We do not intend to cover all of the topics that make up this overarching theme, but to simply focus on the current legal status of the staff who work in the anatomic pathology and forensic departments of the legal medicine institutions, highlighting, at the same time, the legislative shortcomings of the Romanian medical system. We then conclude this paper with a few considerations on the practice of the courts and with formulation of proposals aimed at mending what we consider to be a failure of the lawmaker in regulating a legal issue which, although it originates from employment relationships, has legal effects in terms of employees' pension rights.

Keywords: *special working conditions, pension right, unconstitutional, legal medicine institutions, pathological anatomy and forensic (prosection) services.*

1. Introduction

This paper examines the main aspects related to inclusion under the special working conditions regime of the jobs carried out by the staff of the pathological anatomy and forensic departments within legal medicine institutions. With regard to the legal issue that is the subject matter of this paper, it should be noted that, although the issue of job classification originates from employment relationships, the seat of the matter is the social insurance legislation. Such a classification generates legal effects on the employee's pension rights plan - materializing in the granting of additional periods to their length of service, which represents contribution periods, the decrease in the retirement age in relation to the length of service in difficult working conditions, as well as the increase of the monthly scores achieved in the respective periods – subject to a condition which must be fulfilled during the contribution period, namely that of withholding and paying social insurance contributions that are differentiated on a percentage basis depending on the type of working conditions.

The issue dealt with in this paper is of utmost importance, given the inconsistent interpretation and application of *Law no. 104/2003 regarding the handling of human corpses and the harvesting of organs and tissues from corpses for transplantation purposes*, republished (hereinafter referred to as Law no. 104/2003), a mishap that was generated by a regulatory omission, be it intentional or not. More specifically, the legislative

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solution referred to in art. 22[1] of Law no. 104/2003 was seen, on the one hand, as a privilege granted by the lawmaker to a certain category of personnel, namely the staff working in the pathological anatomy and autopsy departments of the hospitals, as well as the staff of the Anatomy, Histology, Pathological Anatomy and Cellular Biology Departments within universities, and, on the other hand, as a completely unjustified disadvantage in the case of the staff who carry out identical activities within the forensic medicine institutions.

In other words, Law no. 104/2003 has established a special regulation, derogating from the common law in the matter of public pension system – *i.e.*, Law no. 19/2000 regarding the public pension scheme and other social security rights, in force at that time, and Law no. 263/2010 on the unitary public pension scheme, in force at the date of this paper – regarding classification of certain jobs under the special working conditions regime, in the sense that Law no. 104/2003 classifies *ope legis* these jobs as jobs performed under special working conditions, without any preliminary evaluation procedures, based on the degree of occupational hazards the personnel carrying out jobs in the pathological anatomy and autopsy departments of hospitals are exposed to, compared to the staff of the Anatomy, Histology, Pathological Anatomy and Cellular Biology departments in universities.

Despite the fact that the lawmaker has intended to regulate in favor a certain category of employees – based on obvious data, in the sense that, no matter what steps are taken to reduce or eliminate the risks factors associated with handling human corpses, such risks cannot possibly be completely eliminated – in disregard of the principle of equal rights[2], the lawmaker has in fact managed to create a discrimination between the category of employees nominated by the law and the employees of the legal medicine institutions, who carry out activities that are identical with those referred to in art. 22 of Law no. 104/2003.

(Un)fortunately, this situation has ultimately called for examination by the Constitutional Court of Romania of the constitutionality of the legal provision concerned, with the Court holding, by its dec. no. 53/04.02.2020[3] (hereinafter referred to as CCR dec. no. 53/2020), para. 34, that „*the criticized legal provisions are discriminatory, creating an unreasonable divide in legal treatment, in terms of the legal measures regarding the security and health of employees, between the personnel who carry out their jobs under similar working conditions, for which reasons the legal provisions concerned are adjudicated as unconstitutional*."

Until present, there has been no specialized literature addressing the legal issues related to inclusion under the special working conditions regime of the jobs performed by the staff of the pathological anatomy and forensic departments of the legal medicine institutions, or dealing, at least, with the current legal standing of the staff referred to in art. 22 of Law no. 104/2003, in a situation where, although more than three years have passed since the publication of CCR dec. no. 53/2020, the lawmaker has not bothered to review the criticized legal provisions and make them compliant with the CCR decision, fact that has led to inconsistencies in the interpretation and application of Law no. 104/2003, including the provisions regarding the personnel referred to by the law under consideration.

2. Legislative evolution

It is worth noting that there has been a tortuous evolution of the applicable legal norms in the matter under consideration, marked by the transition from an approach whereby the task of job classification was left with the employers (with a potential fault of the employer affecting directly the employees) to the *ex lege* classification of jobs under the special working conditions regime in the case of staff carrying out pathological anatomy and forensic activities within hospital settings, within legal medicine institutions and within the Anatomy, Histology, Anatomic Pathology and Cellular Biology Departments of universities.

2.1. Regulations applicable between April 1, 2001 and April 3, 2003

From the historical and teleological interpretation of the legal texts that are incident in this field, it should be noted that, after April 1, 2001, when Law no. 19/2000 regarding the public pension scheme and other social

[1] Art. 22 of Law no. 104/2023 reads as follows: „jobs performed by the staff working in the pathological anatomy and autopsy departments of hospitals, as well as the staff of the Anatomy, Histology, Pathological Anatomy and Cellular Biology Departments within universities fall under the category of jobs performed in special working conditions".

[2] Under incidence of art. 16 (1) of the Constitution, which reads as follows: „All citizens are equal before the law and public authorities and are entitled without any privileges or discrimination to the protection of the law".

[3] Published in the Official Gazette of Romania, Part I, no. 199/12.03.2020.

insurance rights (hereinafter referred to as Law no. 19/2000) came into force, the former system, according to which jobs had been classified under work groups I, II and III on the basis of a procedure that was the employer's responsibility, was abandoned. Under the new regulation, jobs were defined and classified as follows: jobs performed under difficult conditions, jobs performed under special conditions and jobs performed under normal conditions, based on criteria established by the law.

In essence, the correspondence between the former special work groups and the difficult working conditions was established under art. 15 of GD no. 261/2001 regarding the criteria and methodology for classification of jobs performed under difficult conditions (hereinafter referred to as GD no. 261/2001)[4], according to which jobs, activities and professional categories that had been classified under the work groups I and II until the entry into force of the new normative act were considered activities carried out under difficult conditions, except for those that, according to the provisions of Law no. 19/2000, were classified as activities carried out in working environments characterized as special working conditions.

Thus, the activity that had previously been performed in a higher work group was a necessary yet not a sufficient condition for its classification under the category of job performed in difficult conditions, since, from the corroborated interpretation of the provisions of art. 19 para. (2) and (5) of Law no. 19/2000 and art. 16 of GD no. 261/2001, it follows that the classification of jobs under the special working conditions regime could be carried out by the employer provided only that, following application of the methodologies established by the aforementioned decision, the employer managed to obtain approval by the administrative body, and only for the jobs expressly specified in the approval.

The approval for classification of jobs as jobs performed under difficult (special) conditions had to include a set of relevant information and was granted on the basis of the documents expressly provided for in art. 4 para. (1) of GD no. 261/2001: determinations of occupational health hazards carried out by the authorized laboratories listed in Annex no. 1 of the Decision in the presence of labor inspectors, findings of the territorial labor inspectorates and copies of the list of occupational diseases or the summary of medical analyzes and the evaluation sheet referred to in Annex no. 2 or 3 to the said Decision.

Although it is beyond the scope of our analysis, it is worth noting that GD no. 260/2001 was in force until its repeal by GD no. 246/2007 establishing the methodology for renewing the approvals for job classification under the special working conditions regime (hereinafter referred to as GD no. 246/2007)[5], a normative act that established the methodology for renewing the approvals regarding classification of jobs under the special working conditions regime, whose scope covered the employers who were holding valid approvals at the time, because, after the entry into force of GD no. 246/2007, the granting of new approvals was no longer possible, so the only procedure allowed was the renewal of approvals that had already been issued.

2.2. Regulations applicable after April 3, 2003

On April 3, 2003, Law no. 104/2003, republished in 2014, was enacted, which is the general legal framework that regulates on the handling of human corpses and the harvesting (procurement) of organs and tissues from corpses, and in particular on the specialized activity carried out in hospital settings, though specific legislation was in place at the time in the forensic medicine field.

Examining the content of art. 22, one may notice that the lawmaker classifies under the special working conditions regime the jobs carried out by the personnel working in the pathological anatomy and morgue departments of hospitals, as well as the personnel of the Anatomy, Histology, Pathological Anatomy and Biology departments of universities, while ignoring the jobs of the anatomic pathologists and forensic specialists working with legal medicine institutions, despite the fact that the activities carried out by forensic institutions are identical or at least comparable to the similar activities carried out in hospital settings, though the occupational hazards associated with handling human corpses and examining biological samples are present in both cases.

By dec. no. 24/2019[6] of HCCJ, the Panel dealing with the review for the uniform interpretation of the law, the Court held that „for *a uniform interpretation and application of the provisions of art. 22 of Law no. 104/2003 regarding the handling of human corpses and the harvesting of organs and tissues from corpses for transplantation purposes, republished, the jobs of the staff working in the pathological anatomy and morgue*

[4] Currently repealed.
[5] Currently repealed.
[6] Published in the Official Gazette of Romania, Part I no. 1001/12.12.2019.

departments of hospitals, as well as the staff working in the Anatomy, Histology, Pathological Anatomy and Cellular Biology departments of universities shall be treated ex lege as jobs performed under special working conditions, without the obligation to apply the methodology established by GD no. 261/2001 regarding the criteria and methodology for classification of jobs as jobs performed in special working conditions, with subsequent amendments and additions, and, by GD no. 246/2007, respectively, regarding the methodology for renewing the approvals for classification of jobs as jobs performed under special working conditions, with subsequent amendments and additions, as regard the criteria and methodology for such classification".

Therefore, in view of the rulings by the HCCJ, after the entry into force of Law no. 104/2003, the employer is required to pay to the state budget the social insurance contributions corresponding to the special working conditions, to the knowledge of the territorial pension houses, without having to go through formalities for obtaining approvals from the territorial labor inspectorate, as we have shown above.

The same decision has also shown that, when drafting Law no. 104/2003, account was taken of the need to regulate the pathological anatomy and forensic activities carried out in hospitals and to protect the doctors and the patients during performance of the medical acts, as well as of the need to regulate on the legal and ethical conditions for performing necropsies and collection of corpses by the higher medical education institutions, for teaching or scientific purposes.

HCCJ also held that the phrase „*special working conditions*" should be interpreted in a consistent manner, both from the perspective of the fact that the lawmaker had automatically eliminated by law the possibility that the jobs concerned be classified as jobs performed in normal working conditions, as well as from the perspective of the rights and obligations of the employees and of the employer, with practical consequences on salary level and on the amount of contributions payable to the public pension scheme. As a matter of fact, one of the reasons why the employer was required, according to Law no. 19/2000 (until the entry into force of Law no. 104/2003), to obtain approval for placing jobs under the special working conditions regime, was the fact that the decision-makers involved in this procedure were constantly looking for an improvement, a normalization of the working conditions, so as to prevent work accidents and occupational diseases, a goal that is actually impossible to achieve when it comes to the specialized personnel referred to in art. 22 of Law no. 104/2003.

It should also be noted that the activities of forensic and anatomic pathology autopsies are carried out only in hospitals or within forensic medicine institutions, according to art. 7 of Law no. 104/2003, so the law has emphasized the special nature of the working conditions associated with the performance of the jobs of the specialized personnel specified under art. 22 of the aforesaid normative act.

Insofar as the GO no. 1/2000 regarding the organization of the activity and the functioning of legal medicine institutions, republished, does not grant forensic doctors the same rights that art. 22 of Law no. 104/2003 grants to the personnel working in the pathological anatomy and autopsy departments of hospitals and to the staff of the Anatomy, Histology, Pathological anatomy and Biology departments of universities, the establishment of a different legal treatment for forensic doctors is unsubstantiated.

Moreover, this lawmaking method is hard to understand, given that, as HCCJ dec. no. 24/2019 itself has stated, there should be a correlative compensation for the efforts and occupational hazards to which the people working in pathological anatomy and forensic departments are exposed to, such compensation to also include the granting of benefits upon exercising their pension rights.

This discriminating regulation has generated disputes among the medical staff, as well as labor conflicts between the staff working in the pathological anatomy and forensic departments within legal medicine institutions and their employers and has eventually led to a review of the constitutionality of the legal provision concerned by CCR, with the Court holding in its dec. no. 53/2020 that the legislative solution referred to in art. 22 of Law no. 104/2003 is unconstitutional.

In its considerations, CCR has shown that „*medical and educational activities involving the handling of human corpses and the harvesting of organs and tissues from corpses for transplantation purposes are benefiting from a special regulation, which establishes specific rights for the personnel who carry out these type of activities, such as, for example, the right to inclusion of their jobs in the category of jobs performed under special working conditions. These jobs are also a part of the duties of the legal medicine institutions. However, considering the specifics of these institutions, namely their contribution to the administration of justice by establishing the truth in criminal, civil or other matters, forensic medicine is covered by a separate regulation, i.e., by GO no. 1/2000. However, the Court considers that the pathological anatomy and forensic activities carried out within these institutions are exposed to the same occupational hazards as the similar activities carried out in hospitals.*

Therefore, application of a distinct legal treatment to the staff of legal medicine institutions that carry out activities of this kind, by precluding them from enjoying the benefits associated with classification of their jobs as jobs performed in special working conditions, appears to lack any objective and reasonable grounds. The fact that the activity of forensic medicine institutions contributes to the administration of justice cannot be regarded as an objective and by no means as a reasonable ground for enactment of a distinct set of rules, with discriminatory consequences, given that the occupational hazards based on which such jobs are classified as jobs performed under special working conditions are identical with the hazards attached to the jobs performed by the forensic staff within the legal medicine institutions, such risk deriving from the very nature of this specific type of activities, as we have held above. Therefore, the Court considers that the criticized legal provisions are discriminatory and create an unfounded divide in legal treatment, in terms of the legal measures concerning the health and safety of employees, between the different types of personnel carrying out jobs in similar working conditions, which is why the criticized provisions are adjudicated as unconstitutional."

By CCR dec. no. 53/2020, the Court did not find the provisions of art. 22 of Law no. 104/2003 to be unconstitutional in their entirety, nor did the Court held that some of the provisions concerned should be eliminated from the text of law, but the Court limited its judgment to adjudicating as unconstitutional the legislative solution of excluding the staff from legal medicine institutions, who carry out medical activities involving handling of human corpses, from the category of personnel performing jobs that are classified as jobs performed in special working conditions.

Obviously, the manner in which the CCR has understood to settle the plea of constitutional challenge of the legal provisions under considerations has an impact also on the legal effects that the admission of the plea generates in terms of application of the provisions of art. 22 of Law no. 104/2003, such effects to be analyzed by taking into account, on the one hand, the fact that we are in the presence of an *a posteriori* review of constitutionality and, on the other hand, the fact that the decision is of an interpretative nature.

The specialized literature has shown that interpretive decisions are decisions which, while they do not expressly establish that a given piece of legislation is unconstitutional, they nevertheless attach a certain meaning to the criticized norms, in an attempt to make those norms compatible with the Romanian Constitution by the way the norms are interpreted and in consideration of the grounds presented. An interpretive decision, as the author emphasizes, does not adjudicate a piece of legislation as absolutely constitutional or unconstitutional; instead, it leaves room for interpretation by using the wording „*to the extent that*", with the legal norm following to be interpreted as the CCR may decide[7].

We will not embark here on an elaborate analysis of the typology of CCR dec. no. 53/2020, which would rather be more appropriate for a monograph. Instead, we will emphasize the fact that, as the case law has consistently held[8], from the analysis of the considerations of the aforesaid decision, it does not appear that the constitutional court considered a solution in the sense that, given the existence of an unjustified discrepancy in legal treatment between the category of staff expressly mentioned in art. 22 of Law no. 104/2003 and the staff carrying out similar jobs within forensic medicine institutions, the legal provisions concerned should no longer apply. Instead, the constitutional court has attached to the legal norm concerned a meaning that is in accordance with the Fundamental Law.

In fact, the Constitutional Court ruled that, regardless of the interpretations that may be given to a text of law, when the Court decides that only a certain interpretation is in accordance with the Romanian Constitution, thereby maintaining the presumption of constitutionality of the text in its interpretation, then the law courts and the administrative bodies must comply with the Court's decision and apply it as such.

This being said, it follows that, although art. 147 para. (1) of the Constitution establishes that the provisions of the laws, orders and regulations in force, which are found to be unconstitutional, should cease to produce legal effects 45 days after publication of the CCR decision, unless the parliament or the government, as the case may be, does not reconcile within the said timeframe the unconstitutional provisions with the provisions of the Constitution, in the present case, the text of law under consideration cannot be considered to have been removed from the legislation insofar as it is still applied in the interpretation established by CCR.

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[7] C. Ionescu, I. Chelaru, *Considerations on the Decisions of the Constitutional Court and Their Legal Effects*, in Dreptul no. 9/2015.

[8] See, in this regard: Bucharest CA, VIIth section in cases dealing with labor disputes and social insurance, dec. no. 3947/03.11.2020; Bucharest CA, VIIth section in cases dealing with labor disputes and social insurance, dec. no. 2578/19.04.2022; Bucharest CA, VIIth section in cases dealing with labor disputes and social insurance, dec. no. 3704/09.06.2022; Bucharest CA, VIIth section in cases dealing with labor disputes and social insurance, dec. no. 5415/17.10.2022.

On the other hand, like any other decision of the Court, interpretative decisions are generally binding, according to the provisions of art. 147 para. (4) of the Constitution [9]. As a matter of fact, the specialized literature says that it is precisely the constitutional enshrining of the general binding nature of the Court's decisions which establishes that they should be imposed on all the subjects of law, in the exact same manner as a normative act, unlike the decisions of the law courts, which are binding only *inter partes litigants*[10].

3. Conclusions

At least at first glance, the intervention of the Constitutional Court seems to be intended to put an end to the disputes regarding interpretation of the provisions of art. 22 of Law no. 104/2003, in the sense that the jobs of the staff working in the pathological anatomy and forensic departments of legal medicine institutions should be included *ex lege* in the category of jobs performed in special working conditions, without the need to apply the methodology established by GD no. 261/2001 and GD no. 246/2007, respectively, and should benefit from the same treatment applicable to the personnel carrying out their jobs in the pathological anatomy and morgue departments of hospitals.

However, the confrontation of the legal norm with the reality has revealed that certain aspects related to the inclusion under the special working conditions regime of the activity of the staff of legal medicine institutions carrying out medical activities involving the handling of human corpses call for improvement or additions, such aspects being presented in this paper as *de lege ferenda* propositions.

Thus, even if the constitutional court has decided how to interpret the provisions of art. 22 of Law no. 104/2003 in accordance with the rules of the Fundamental Law, we believe that the choice of the Romanian lawmaker to not expressly provide under art. 22 of Law no. 104/2003 that the jobs performed by the staff working in the pathological anatomy and forensic departments of the legal medicine institutions are included *ex lege* in the category of jobs performed under special working conditions, should be amended by expressly regulating on this matter accordingly.

In fact, it has happened quite often in practice that the requests for establishing the classification of such jobs as jobs performed in special working conditions, as well as the request for the payment of social insurance contributions in relation to the special working conditions, formulated by the staff working in the pathological anatomy and morgue departments of medical institutions to be rejected by employers, relying on lack of an express legal regulation in this field, with employees being thus forced to turn to justice.

A more serious ground for concern is the fact that, validating the idea according to which art. 22 of Law no. 104/2003 ceased to produce legal effects as of April 26, 2020 because the lawmaker had not amended the challenged provisions, we might expect to witness to some bizarre situations, to say the least, where the jobs carried out by the personnel working in pathological anatomy and autopsy departments of hospitals and the jobs of the staff working in the Anatomy, Histology, Pathological Anatomy and Biology departments of universities are excluded from the category of jobs classified as jobs performed in special working conditions.

On the other hand, we appreciate the fact that the lawmaker has left out of the scope of art. 22 of Law no. 104/2003 the personnel who carry out medical activities involving the handling of human corpses, but who are assigned to other divisions/departments within forensic medicine institutions, such as the toxicology laboratory personnel. Given that they carry out activities under working conditions similar to those referred to in art. 22 of the aforementioned normative act, we propose that, *de lege ferenda,* the lawmaker should consider the fact that equal rights should be granted to this latter category of personnel as well.

References

- C. Ionescu, I. Chelaru, Considerations on the Decisions of the Constitutional Court and Their Legal Effects, in Dreptul no. 9/2015;
- Romanian Constitution;
- Law no. 104/2003 on the handling of human corpses and the harvesting of organs and tissues from corpses for transplantation purposes, republished;
- Law no. 19/2000 regarding the public pension scheme and other social security rights;

[9] Art. 147 para. (4) of the Constitution reads as follows: „Decisions of the Constitutional Court are published in the Official Gazette of Romania." From the date of publication, the decisions are generally binding and are effective only for the future".

[10] C. Ionescu, I. Chelaru, *op. cit*., *loc. cit.*

- Law no. 263/2010 on the unitary public pension scheme:
- CCR dec. no. 53/2020;
- GD no. 261/2001 regarding the criteria and methodology for classification of jobs performed under difficult conditions;
- GD no. 246/2007 establishing the methodology for renewing the approvals for job classification under the special working conditions regime;
- HCCJ dec. no. 24/2019, the Panel dealing with the review for the uniform interpretation of the law;
- GO no. 1/2000 regarding the organization of the activity and the functioning of legal medicine institutions.