THE ROLE OF THE EMPLOYEES' REPRESENTATIVES IN THE LIGHT OF THE NEW ROMANIAN SOCIAL DIALOGUE LAW

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Abstract

In the environment of constant social and legislative changes, the field of labor law, as part of the private law domain, is always a subject of debates. The year 2011 is a relevant benchmark for the major modifications brought to the field of labor law in Romania.

The amendments of the labor law significant acts had as role to find efficient means of dialogue between the social partners. The legislative provisions represent only a premise for a successful social dialogue. In fact, the key of communication between the social partners is the negotiation.

The employees' representatives, as social partners, may represent the employees' interests within a unit, in the absence of a union. In the light of the new Social Dialogue Law the employees' representatives may also participate in negotiations even in the presence of a union organization.

There is no doubt that the new Social Dialogue law and Labor Code inserted new concepts meant to facilitate the labor relationships and social dialogue. It's only to be seen in which way these new regulations will affect the labor relationships.

Key Words: *Social Dialogue, social partners, labor conflict, negotiation, employees' representatives*

Introduction

Labor relationships represent a very important part of the private law domain, with significant repercussions over the social and economic life of every state. As a result of constant social evolution and in the context of a global economic crisis with general effects in various aspects of the social life, some legislative changes came as a natural result in Romania.

During the year of 2011, two of the major acts bringing new provisions in the field of labor law were the Labor Code republished and the Social Dialogue Law.

The Labor Code was practically written again, all laws regulating the collective labor relationships were abrogated and replaced by a single law, Law no. 62/2011.

Some of the declared goals of the legislative changes were to render the labor market more flexible and to simplify the contractual procedures.[1]

The Law on Social Dialogue aimed to consolidate the following five acts into one law: Law no. 54/2003 on trade unions, Law no. 356/2001 on employers, Law no. 109/1997 on the organization and functioning of the Economic and Social Council, Law no. 130/1996 regarding collective labor contracts, Law no. 168/1999 regarding the settlement of labor conflicts.[2]

Before the Romanian Labor Code came into force, the institution of „employees' representatives" was regulated only in what concerned the negotiation and closing the collective labor contracts in the hypothesis in which in a certain unit there was no representative union.[3]

Also, we were in the presence of regulations stipulated in several special laws that were making references to the role of the employees' representatives, which will were abrogated.

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[1] Raluca, Dimitriu, "Collective labor conflicts in companies and public institutions: some prospects**",** Transylvanian Review of Administrative Sciences, No. 34 E/2011, pp. 81.

[2] Raluca, Dimitriu, "Collective labor conflicts in companies and public institutions: some prospects**",** Transylvanian Review of Administrative Sciences, No. 34 E/2011, pp. 83.

[3] Ion, Traian, Ştefănescu, "Tratat teoretic şi practic de drept al muncii", Universul Juridic, Bucureşti, 2010, p.125-126.

The social dialogue is the instrument for ensuring the social peace. The social peace is a result of the social dialogue between social partners[4]. Article no. 214 the Romanian Labor Code published in 2003 article 214 [and article no. 211 of the Romanian Labor Code republished in 2011] stated that: "In order to ensure a climate of stability and social peace, the law foreseen consultation and constant dialogue means between the social partners."

The present article has as objective to show the importance of employees' representatives in the light of the new Romanian Social Dialogue Law. In order to be able to speak about the role of this type of social partners or representatives of social partners is essential to analyze some terms such as: labor relationships, social partners, employee, employer, social dialogue, social peace, what happens when we are in the presence of collective labor conflicts and what are the means of settlement.

The Romanian legislation on collective labor conflicts, currently at crossroads, is rather susceptible to discourage the initiation of collective labor conflicts. Such a situation looks alarming since the absence of conflicts does not in fact mean social peace. Irrespective of the law system, social peace is a result of a conscious and voluntary effort, never imposed upon the potential actors.[5]

Definitions and general presentation of the legislative provisions

Defining the elements involved in the labor relationships was always a concern of the Romanian legislator.

The main social partners involved in the labor relationships are the employer and the employee. The new social dialogue law defines the social partners in the article no. 1, letter a) as it follows: "the social partners are the unions and the unions' organizations, the employers and the syndicates and also the representatives of the public administration authorities, which interact in the social dialogue process."[6]

Before being abrogated, the Law no. 168/1999 was using the term "unit" as for indicating a juridical person that uses the work of employees. Art. 6 (2) of the Law regarding the settlement of labor conflicts foreseen that "The labor conflicts between the employers, private individuals and their employees will be settled in accordance with the provisions of this law." The term "unit" was meanwhile abandoned in the juridical literature under the influence of the Labor Code that doesn't use it anymore. [7]

The Labor Code uses a term with a wider understanding, which is "employer"[8], including in this notion the persons that employ paid work. So, in accordance with the legal text of article no. 14 of the Labor Code "the employer is a private individual or a juridical person that can provide employment on the basis of an individual labor contract, in accordance with the legal provisions."

The law no. 62/2011 updated the definition given by the Labor Code: "The employer is a private individual or a juridical person that can provide employment on the basis of an individual labor contract or a working relationship."[9] The new element is the fact that the legal ground for the employment is not only an individual labor contract, but also a working relationship. This provision is wider than the one used by the Labor Code and it comprises in the notion of employee not solely the persons employed on the basis of an individual contract, but also other types of employed persons [such as public servants with special status - like militaries, policemen - that work on the basis of collective labor contracts, in accordance with special laws].

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[4] Raluca, Dimitriu, "Legea privind soluționarea conflictelor de muncă, Comentarii și explicații" –C.H. Beck, Bucharest, 2007, p.14.

[5] Raluca, Dimitriu, "Collective labor conflicts in companies and public institutions: some prospects**",** Transylvanian Review of Administrative Sciences, No. 34 E/2011, pp. 96.

[6] Law no. 62/2011, published in the in Official Journal no. 322/10.05.2011.

[7] Raluca, Dimitriu, "Legea privind soluționarea conflictelor de muncă, Comentarii și explicații", p. 6.

[8] Article no. 14 of the Law no. 53/2003 republished in 2011.

[9] Article no. 1, letter e).

The social dialogue is the willing process of informing, consulting and negotiating between the social partners in order to establish agreements in what concerns problems of commune interest.

The informing consists in the obligation of the employer to transmit data to the union or the employees' representatives with the aim for them to get used to the themes of debates and to permit a proper assessment from their part.

The consultation involves the change of opinions within the process of social dialogue.

The collective negotiation is the negotiation between the employer/syndicate on a hand and union/unions' organizations or employees' representatives on the other hand. The collective negotiation has as goal to regulate the labor or working relationships between the involved parties and also any other agreements for matters of commune interest.[10]

The collective labor contract represents the written convention closed between the employer/syndicate and the employees representatives meant to establish the rights and obligations resulted from the working relationships. By closing collective labor contracts the goal is to promote and to defend the interest of the signing parties, the prevention and limitation of collective labor conflicts, in order to ensure the social peace.[11]

Law no. 168/1999[12] regarding the settlement of labor conflicts divided collective labor conflicts into: (a) conflicts during the pre-contractual stage, bargaining conflicts, solved by conciliation, mediation, arbitrage, strike, called conflicts of interests, and (b) conflicts during the execution of a collective or individual labor contract, solved by the court of law, called conflicts of rights. This is not a recent classification but it has been present in the Romanian law for a long time. The conflicts of rights occurred because a right stipulated in the law or in the collective or individual contract was not complied with, whereas the conflicts of interests occurred in case of disagreement between the parties regarding a claim of the workers not yet stipulated by law, the collective or the individual labor contract. The conflicts of rights were usually solved by the court while the conflicts of interests were solved by specific, extra-jurisdictional methods (conciliation, mediation, arbitrage, strike).

Against this logical approach already in place, which was perceived as fair by the doctrine and by jurisprudence, the new Law on Social Dialogue brings a fundamental change: it removes the difference between conflicts of rights and conflicts of interests (difference which is admitted either expressly in legislation or in the jurisprudence of almost every European law system) replacing it with the classification of the labor conflicts into collective and individual disputes.

Currently, therefore, if the collective contract cannot be concluded because the employer and the employees cannot reach a mutual agreement, a collective conflict can be initiated. However, which may be the nature of a conflict arisen as a result of non-compliance with a collective contract? Such a conflict can no longer have a collective nature (since the collective conflicts are defined exclusively in relation to the moment when the collective contracts are negotiated). It results, somehow surprisingly, that a dispute arisen from non-compliance with a provision in the collective contract can only have an individual nature (irrespective of the number of employees or public servants affected).[13]

Before coming into force of the Social Dialogue Law no. 62/2011 the institution of employees' representatives was regulated by the Labor Code provisions and several special laws. The Social Dialogue Law abrogated most of the important special laws in the field of labor relationships and the new Labor Code also brought novelty elements in the domain, including in what concerns the employees' representatives.

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[10] Article no. 1, letter b) of the Law no. 62/2011.

[11] Article no. 1, letter i) of the Law no. 62/2011.

[12] Abrogated by Law no. 62/2011.

[13] Raluca, Dimitriu, "Collective labor conflicts in companies and public institutions: some prospects**",** Transylvanian Review of Administrative Sciences, No. 34 E/2011, pp. 83.

The law no. 168/1999 related to solving the collective labor conflicts established different attributions for the employees' representatives linked to the interests conflicts, including the right for strike [in case of no representative union].[14]

Although achieving social peace would be ideal, sometimes this doesn't necessarily mean that it's in everybody's best interest. That's why it's important to have instruments of coming to a settlement in case of labor conflicts occur. The Social Dialog Law foresees as means of settlement in case of collective labor conflicts: the conciliation, the mediation and the arbitrage. These means of settlement are instruments only for the parts involved in the conflict.

The conciliation procedure is mandatory. The law contains provisions related to the procedural steps in case of conciliation. If after the debates the parties reach an agreement with reference to the demands, the collective labor conflict ends.

In case the conflict is still not solved, the parties may decide, expressing their free willingness, to initiate the mediation procedure, in accordance with the provisions of the law.

Also, during the conflict the parties may decide, expressing their free willingness, to let an arbitrator to decide upon their demands. The arbitral decisions are mandatory for the parties, update the provisions of the collective labor contracts and are enforceable from the moment they were rendered.

Mandate of the employees' representatives

The regulations concerning the employees' representatives were comprised in Chapter III, articles 224-229 of the Labor Code. The new Labor Code also assigns a special chapter to this institution, Chapter III, articles no. 221-226.

In accordance with the Romanian Labor Code the chosen employees' representatives on the basis of a special mandate can promote and represent the interests of the employees in units with more than 20 employees where none of them is a union member.

Between the employees' representatives and the employees that have chosen them there is a juridical connection that has its legal grounds in a contract of civil mandate.[15]

The employees' representatives are chosen within the employees' general meeting, with the vote of at least half of the total number of employees.

The employees' representatives can not be involved in activities recognized by the law as being an exclusive attribution of the unions.

The employees' representatives can be chosen from within the employees having at least 21 years old and that have been worked in that unit for at least one year without any interruption.

The condition related to the duration of working in a unit is not applicable in what concerns the employees' representatives in the new incorporated units.

The number of employees' representatives is being established together with the employer in accordance with the number of employees.

The duration of the mandate for the employees' representatives can not exceed 2 years.

As it can be easily interpreted from the legal text of the Labor Code, the employees' representatives have to fulfill a series of conditions in order to have this capacity, such as:

- The unit where they perform their activity must have at least 21 employees;
- The employees they represent don't have to be members of a union;
- They have to have a special mandate given by the employees in order to promote and represent their interests;
- They have to be at least 21 years old;
- They must have been worked in that unit for at least 1 year without any interruption.

[14] Ion, Traian, Ştefănescu, op.cit., p.126.
[15] Ion, Traian, Ştefănescu, op.cit., p.127.

In accordance with the Labor Code published in 2003[16], the employees' representatives had the main legal attributions:[17]

- To keep evidence that the employees' rights are being respected, in compliance with the current legislation, the applicable collective labor contract, the individual labor contracts and with the internal regulation;
- To participate in elaborating the internal regulation;
- To promote the employees' interests related to salaries, working conditions, duration of the working time, stability in work and any other professional, economic and social interests linked to the labor relationships;
- To inform the labor inspectorate referring to the non compliance with the legal regulations and with the amendments of the applicable collective labor contract.

The modification of the Labor Code[18] added a new attribution to the employees' representatives[19]:

- To negotiate the collective labor contracts, in accordance with the law.

Before the Labor Code was republished the previous regulation didn't foresee the right of the employees' representatives to negotiate the collective labor contracts, art. 223, letter e) being a new element of the Labor Code.

In the presence of the 2003 Labor Code, in practice we were facing a problem: the representatives chosen in accordance with the Labor Code were they entitled to negotiate and close the collective labor contract and to conduct a strike? Or, by contrary, although in the presence of such representatives (chosen in accordance with the Labor Code), other representatives should be chosen, in accordance with special laws, for closing the collective labor contract or for conducting a strike? And the other way around: the representatives pro causa, meaning chosen for closing the collective labor contract or for conducting a strike [in the absence of a representative union and of other representatives chosen in accordance with the Labor Code's provisions] could they performs also the attribution foreseen by the Labor Code?[20]

In the first case, this problem was solved by the stipulation of article no. 223, letter e) of the new Labor Code.

In the second case, the extension of the attributions of the employees' representatives chosen to negotiate the collective labor contract or for organizing a strike is not possible taking into consideration that the laws in the matter are applicable only in the situation foreseen for their purpose.[21]

The employees' representative attributions, the means of fulfilling their tasks and the duration and limits of their mandate are established by the employees' general meeting, in accordance with the law provisions.

Similar to the regime of the unions' leaders, the employees' representatives are entitled to some facilities and measures of protection.

The time spent by the employees' representatives in order to accomplish their assigned mandate is of 20 hours a month and it's being considered as working time and it's duly paid.

During their mandate the employees' representatives can not be fired for reasons that are not related to the employee, for being professional unfit or for reasons that are linked to the mandate of representing the employees.

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[16] Law no. 53/2003, published in the Official Journal no. 72 on 05.02.2003.

[17] Article no. 226 from Law no. 53/2003 ; the new Labor Code published in the Official Journal no. 345 on 18th of May 2011 – article no. 223.

[18] Law no. 53/2003 republished in May 2011 in the Official Journal no. 345 on 18.05.2011.

[19] Article no. 223, letter e) of the Law no. 53/2003 republished in 2011.

[20] Ion, Traian, Ştefănescu, op.cit., p.126.

[21] Idem.

Definitely, the most important attribution of the employees' representatives is the negotiation of the collective labor contract within a unit.

The initiative concerning the negotiation of the collective labor contract is subject to several steps, as it's being stated in the social dialogue law.[22]

It's important to know that the employer or the syndicate initiates the collective negotiation with at least 45 working days before the expiring of the collective labor contracts.[23] In the case where the employer or the syndicate doesn't initiate the negotiation, this one will start due to the written request of the employees' representative, within 10 days from the request.[24]

The negotiation can not last more than 60 working days, unless we are in presence of an agreement between the social partners. [25]

The law foresees the possibility that through the collective labor contracts to establish to periodically renegotiate any stipulation convened by the parties.[26]

During the first negotiation meeting, the employer settles which public and confidential information can provide to the employees' representatives in accordance with the law (information regarding the updated economical-financial situation and the employment situation). [27]

Also, with the occasion of the first negotiation meeting, the social partners will write a report which will mention the most important information related to the members of the negotiation teams for each side, the maximum period of negotiation, the place and calendar of the meetings. [28]

The negotiations between the employees' representatives and the employer are final when the collective labor contract is being closed and registered at the competent authorities.

Conclusions

Considering the facts presented so far, the aim was to see in which way the legislative changes brought modifications to the attributions of the employees' representatives and in which way these updates improved the labor relationships, but also to compare the previous provisions with the new ones.

There is no doubt that the legislative changes in the field of labor relationship were required in the context of social and economical evolution. Both the Labor Code republished and the Social Dialog Law widened the attributions of the employees' representatives. Taking into consideration that currently it's very difficult to achieve representativeness for unions/unions' organization in order to be able to negotiate the provisions of the collective labor contracts, giving the possibility of negotiation in such case for the employees' representatives even in the presence of a union, can only be a positive change for the employees' interests.

From practical point of view the actual effects are to be noticed in the future and based on these effects a proper assessment of the impact over this area of private law will be made.

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[22] Law no. 62/2011.
[23] Art. 129 paragraph 3 of the Law no. 62/2011.
[24] Idem, paragraph 4.
[25] Idem, paragraph 5.
[26] Idem, paragraph 6.
[27] Art. 130 paragraph 2 and 4 of the Law no. 62/2011.
[28] Idem, paragraph 5.

- Ion, Traian, Ştefănescu, "Tratat teoretic şi practic de drept al muncii", Universul Juridic, Bucureşti, 2010;
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