

INDIVIDUAL EMPLOYMENT CONTRACT SUSPENSION IN CASE OF ACTIVITY INTERRUPTION AND / OR THE TEMPORARY ACTIVITY REDUCTION

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Abstract

The economic and financial reasons determined by the current crisis have imposed to the Romanian legislator that, in the flexible regulatory context concerning the labour reports, has to intervene to reduce the loss. The legal framework available to the employer in this situation refers to the provisions of the art. 52, 1st paragraph, letter c, art.52, 3rd paragraph, art.53 and 122, 3rd paragraph, all from Law no.40/2011, for Law no.53/2003 modification and amendment concerning the Labour code. Under conditions of economic crisis, it is natural that employers have the necessary means to efficiently organize their activity, meanwhile keeping its staff on these periods. This does not mean that, during the suspension period the employees can not resign, no need to terminate the suspension provided for in Article 52 line 3 of the Labour Code in order to intervene in the individual labor contract termination. From the employer's perspective there is no ban imposed to him by art. 60 of the Labour Code in relation to this type of suspension, so that the latter may proceed to dismiss the employee during the unilateral suspension of his labor contract arranged under Article 52 line 3 of the Labour Code.

Key words: suspension, activity interruption and/or the temporary activity reduction, crisis, employer, to reduce the loss

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I. The legal framework available to the employer in this situation refers to the provisions of the art. 52, 1st paragraph, letter c, art.52, 3rd paragraph, art.53 and 122, 3rd paragraph, all from Law no.40/2011², for Law no.53/2003 modification and amendment concerning the Labour code.

1. According to art.52, 1st paragraph, letter c of the Labour Code, the individual employment contract may be suspended from the employer's initiative in case of activity interruption or the temporary reduction, without the employment relationship termination for economic, technological, structural or similar reasons.

By the Decision no.383.2011³ of the Constitutional Court, the provisions of the art.52, 1st paragraph letter. c from the Law no. 40/2011 were declared constitutional. In explanation, the Court showed that "these dispositions give to the employer the possibility to suspend the individual employment contract even in the situation of its temporary activity reduction. Such reduction is not a pure subjective one, meaning that it will depend entirely on the employer's will, but it has to be included in the normative contents context of the criticized text, so that the employer will be able to suspend the individual employment contract only for an objective reason, that does not depend on his exclusive will. If, in an objective way, the employer will not be economically capable to handle the market demands and, although he will reduce his activity, he will still be forced to pay the staff salaries for the not performed work, would lead to the situation in which his ownership will be irretrievably damaged".

In the same way, *mutatis mutandis*, we have the considerations of the Constitutional Court Decisions no.1.276 from October 12 2010, published in the Official Journal of Romania,

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² Published in the Official Journal of Romania, Part I, no. 225 from March 31 2011 for Law no.53/2003 modification and amendment.

³ Published in the Official Journal of Romania, Part I, no. 225 from April 21 2011.

Part I, no.746 from November 9 2010, in which was stated that “in the absence of the performed work, the employer can not be obligated to pay the remuneration which ignores the concrete and objective situation.

At the same time, the express provision of the labour reports suspension possibility is in order to prevent more drastic layoffs measures layoffs for the period when the employer confronts with economic, technological, structural or similar reasons. Moreover, the ordered measurement may be censored by court. So, it can not be claimed that the employer will have a lower protection from the state after adopting this legislative measure ”.

So, priority was given to the employer ownership over the employee social rights, but, in order to avoid falling into arbitrariness because the employer’s position, we think that the two interests put in balance should maintain equability.

In the old settlement, the legislator will establish the possibility of the contract facultative suspension, from the employer initiative, only in the event of activity interruption, meaning when the employer will be no longer able to ensure the conditions needed to carry out work tasks.

Today, in order to operate this suspension of the individual employment contract, the employer has to interrupt or to reduce temporary the activity because of some economic, technological, structural or similar reasons. Thus, we have two alternative work possibilities: either the employer activity interruption or its temporary reduction.

In the doctrine, was expressed the opinion³⁴ according to which, although that in the art.52, 1st paragraph, letter c from the Labor Code “in refers in a generic way to the < employer activity interruption>, it can not be concluded that the legislator or the social partners will have recognized, in this way, implicit, the lock-out. Logical (and historical) the texts must be interpreted meaning that activity interruption is determined by objective-technical or any other type factors – and not exclusively by employer’s will.”

Therefore, we remember that the art.52, 1st paragraph, letter c from the Labor Code provides to the employer a judicial variant to suspend the individual employment contract execution of its employees, in the technical unemployment situation. Since the individual employment contract initiative belongs exclusively to the employer, we are in the presence of a unilateral act of law. It must be mentioned that this legal regulation is optional for the employer, and not an obligation, this last will decide for himself the opportunity for taking these measures.

2 . According to art.52, 3rd paragraph from the Labor Code, “in case of temporary activity reduction, for economic, technological, structural or similar reasons, on periods that exceed 30 working days, the employer will have the possibility to reduce the working program from 5 days to 4 days per week, along with the suitable salary decrease, until the situation is fixed which have caused the program reduction, after the consultation with the trade union in the unit or the employees’ representative, as applicable. “

In order to meet the employees economic needs, in the situation in which the activity temporary reduction exceeds 30 working days, art.42, 3rd paragraph from the Labor Code, represents the legal ground based on which the employer may use the working program reduction from 5 days to 4 days per week.

This premised situation of this unilateral suspension case of the individual employment contract consists in the temporary activity reduction on periods that exceed 30 working days. Considering the consequences severity brought by this measure to the employee, it is obvious that these days can not be taking into account in a disparate way, the legislator is taking into

⁴ To see Ion Traian Ștefănescu, *Tratat teoretic și practic de drept al muncii, second edition*, revised and enlarged, Universul Juridic Publishing House, 2012, page 384.

consideration a compact period of time, of which a longer period proves the continuous character of this situation. But the accumulation of more 30 days periods is possible since the text does not distinguish, and thus the suspension may be extended.

In the absence of a more enlightening text, we appreciate that this type of suspension may operate even if there is more 30 days interruption periods because these analyzed legal disposals do not require that the temporary activity reduction on larger 30 days period must take place during one year.

The reasons that may lead the employer to take this measure have to be objective. These may be economical, technological, structural or any others similar, but, in all cases, it must exceed a period of 30 working days. For example, the economical reasons may signify a financial impasse of the employer coming from the lack of orders. The technological reasons may occur in case of necessary equipment repair that is used in the work process, their upgrade, etc. The structural reasons require reorganization of some subunits (departments, workshops, etc.) or even of some work formations⁵. The legal text does not defines the “similar reasons” concept, therefore, we appreciate that there will be taken into consideration any other situations which excludes the fault of any parties from the individual employment contract, relating, of course to the assumptions mentioned in the text.

In consequence, the legislator wanted to provide to the employer another way to act, legal, with an optional and temporary feature, in the case when that business has problems.

Obviously, if he would want, the employer will not be able to reduce the working program, for example, to 3 days per week; in this case, he will be against to the imperative provisions from art.38 from the Labor Code according to which “the employees can not drop their rights. Any transaction that aims the dropping or limitation of the employees’ rights is invalid.”

We ask what the legislator meant by the “temporary” concept? The activity reduction may concern the whole year, or more, the employer could conduct an individual employment contract suspension during 3 years, 5 years? Because the legislator did not provide a suspension maximum limit, then, the law is quiet on this matter, theoretical the suspension may last no matter how much. Of course that the situation has to be concluded by the employer, who will have to decide and settle if group or individual layoffs are necessary.

Regarding the legal text imperative feature, we think that the work program reduction will not take place even split, for example, with 2 working hours every day, the possible reduction will be only of one day per week.

We consider that the taken solution, in this way by the legislator is inflexible because the employer is the only one entitled to appreciate in which way he needs employees, considering the encountered difficulties. So, the legislator may establish this unilateral individual employment contract suspension case in a more flexible way so that it will allow more freedom to the employer.

The individual employment contract suspension stipulated in art.52 3rd paragraph from the Labor Code will not work on an unlimited period of time, but it will be kept until the situation that has caused the program reduction will be fixed, the employer will be the one to decide when the suspension starts and ends. If the employer’s activity recovery appears, this thing will be noticeable so that the necessity of the suspension will become obvious. In this situation, the employer is the one who is interested that the working program will be back to normal.

In terms of the parties’ obligations, correlative to the working program reduction from 5 days to 4 days per week and the salary will be reduced according to the worked hours.

⁵ To see Alexandru Țiclea, *Tratat de dreptul muncii*, Universul Juridic Publishing House, 2011, page 672

Another text condition, in order to take these measures, refers to the prior consultation of the trade union in the plant or the employees' representative, if the unit does not have a trade union. The nature of this notice is a constructive one, so its request is mandatory, but not its respecting.

3. In both assumptions, interruption and/or temporary activity reduction, the employer holds an action hypothesis, namely the one settled by the dispositions from the art.53 from the Labor Code.

According to the legal provisions "during the reduction and/or the temporary activity interruption, the employees involved in the reduced or interrupted activity, the one that are not practicing any activity, benefit of a compensation paid from the salary fund, which can not be lower than 75% from the base salary according to the job, excepting the situation from the art.52, 3rd paragraph. During the reduction and/or the temporary interruption from the 1st paragraph, the employees will be available to the employer; this will have the possibility to restart the activity".

These legal dispositions were analyzed by the Constitutional Court as constitutional, non contrary to the economic market principles.

Thus, by the Decisions no.24/2003⁶ and no.872/2008⁷ has been showed that "the temporary activity interruption is imputable to the employees and so it can not be identified with the activity termination because of bankruptcy or with the staff reduction as a follow-up of the reorganization. The indemnity payment of 75% is based on art.1 3rd paragraph from the Constitution; the social state has to ensure, among others, in an effective way the social work protection.

The payment on 75% of the individual basic salary ensured on the payroll, meets the exigencies of Article 10, line 2 letter. b of the ILO Convention no. 168/1988 on Employment Promotion and Protection against Unemployment⁸ according to which " Each Member shall endeavour to extend the protection of the Convention to the following contingencies suspension or reduction of earnings due to a temporary suspension of work, without any break in the employment relationship".

Correlatively to the right to receive compensation, employees are required to remain available to the employer, he having the possibility to order the recovery of activity.

Although the text does not define the phrase "at the employer's call", in corroboration art. 53 with art. 164 line 3 of the Labour Code, which provides that "the employer shall guarantee the payment of a monthly gross salary at least equal to the gross minimum wage in the country where the employee works, within the program, but can not run its work because of reasons that can not be attributed to him, except for strike ", resulting that that employees remain in their home or residence⁹, the parties will establish an employment relationship by mutual agreement on the method to be called back to work.

4. According to art. 122 line 3 of the Labour Code, "during periods of activity reduction, the employer has the option of grant paid time off of which the overtime to be performed in the next 12 months can be compensated."

⁶ Published in the Official Journal of Romania, Part I, no. 72 from February 5, 2003.

⁷ Published in the Official Journal of Romania, Part I, no.577 from July 31, 2008.

⁸ Ratified by Romania by Law no. 112/1992, published in Official Gazette of Romania, Part I, no. 302 of 25 November 1992.

⁹ Brândușa Vartolomei, *Cu privire la corecta interpretare și aplicare a dispozițiilor art. 53 și 159 alin. 3 din Codul muncii*, in „Dreptul” Journal no. 7/2009, p.104.

So, in the event that he reduces his activity, the employer may grant his employees paid time off, the novelty of this provision consisting in the compensation anticipated operation. Thus, "first days off can be granted, for which additional work time will be performed in the future."¹⁰

The rule with regard to overtime compensation consists in its obligation to be compensated by free time paid within 60 calendar days after the operation. In these circumstances, the employee receives the proper wages for the hours that exceed the normal working hours (Article 122 line 1 and 2 of the Labor Code).

II. Correlation between the legal texts described above

Whenever the employer suspends the individual employment contract of its employees, this can be done only under the provisions of Article 52. line 1 letter. c of the Labor Code or, on the contrary, it necessary to supplement the legal ground of one of the other texts mentioned above in order to apply this measure?

We believe that this type of suspension of the individual labour contracts can be based either on the provisions of Article 52. line 1 letter. c of the Labor Code corroborated with Art. 53 of the Labour Code, in which case the employer will be required to pay its employees an allowance paid from the wage funds which can not be less than 75% of the basic salary corresponding to the position held or the suspension may be based solely on Article 52. line 1 letter. c of the Labor Code. In the latter case, the employer may turn to art. Article 52. line 3 of the Labour Code.

A distinction has to be made between the assumptions about either the interruption or reduction of work or only of the work reduction. Thus, assumptions regulated by art. Article 52. line 3 and 53 of the Labour Code covers both interruption and reduction of activity, while the assumption regulated by art. Article 52 line 3 of the Labour Code refers only to the activity reduction. The provisions of art. 122 line 3 of the Labour Code on extra work cover only the situation when only the activity deployed by the employer is reduced.

Depending on the presence or absence of employees to work, a distinction must be made. Thus, things are different as, in the hypotheses regulated by art. 53 of the Labour Code, employees are present at work in the plant, within the program compared to the hypotheses where they are at the employer's call, but they are not at work.

Thus, the provisions of art. 164 line 3 of the Labour Code, according to which " the employer shall guarantee the payment of a monthly gross salary at least equal to the gross minimum wage in the country where the employee works, within the program, but can not run its work because of reasons that can not be attributed to him, except for strike" applies only when the employee is present at work. In this case, the employer is obliged to pay its employees 75% of the basic salary corresponding to the position held, but not less than minimum wage in the country. If the employee is at home, being at the employer's call, the first obtains 75% of the salary.

In reality, there are two distinct situations: the first is the one described above, and the second refers to the situation where employees are available to the employer, but at home, circumstances when they receive an allowance of 75% of the gross minimum wage in the country.

¹⁰ Alexandru Țiclea, *Codul muncii comentat*, Universul Juridic Publishing House, Bucharest, 2011, p. 149;

Another emphasis needed to be done relates to the following facts: in the event of the temporary reduction of activity for reasons listed in Article 52 line 3 of the Labour Code, the employer decides to reduce the working hours from 5 days to 4 days, and meanwhile to return to its normal activity. If subsequently, the work is reduced again, can the employer shift the reduced working hours from 5 days to 4 days, the contracts still being suspended by changing the legal grounds of Article 5 line 3 of the Labour Code in art. 53 line 1 of the Labour Code, to the obligation to pay employees the minimum allowance of 75% of the basic salary corresponding to the position held?

We think that it is possible, as the legal text makes no difference between the two cases. Moreover, depending on the interest pursued, the employer has the opportunity to abdicate the right for its employees to be available to him, preferring rather to keep their individual labour contracts suspended.

III. Procedure for the suspension of the individual labor contract

As to the procedure for suspending the individual labor contracts in the cases provided for by art. Article 52 line 3 of the Labour Code, we show that the labor legislation does not include provisions to this effect. We appreciate that from case to case, depending on the situation occurred, the employer must issue a unilateral decision to suspend the labor contracts of the employees whose work schedule has been reduced. This deed may be called order, provision, decision, and so on, as long as its content is unequivocally established. This decision will be communicated to the employees in any way which provides the effectiveness of knowing of its contents, as well as its receipt.

We are in the presence of a genuine act of labor law, whose legality and opportunity can be reviewed by the court. According to art. 268 line 1 letter a of the Labour Code, the employee may appeal the measure within 30 days from the date of the employer's unilateral decision to suspend the individual labour contract.

Having the power to settle such a dispute, the court may examine not only the legality of the measure, but rather its opportunity, a real judicial control can be achieved only after checking the actual reasons that have made the employer adopt this measure. For this purpose, the court shall proceed to a thorough check of the reasons pleaded by the employer, even with the consent of specialized legal expertise.

IV. Conclusions

It can be said that by inserting these texts in the Labour Code, the Romanian legislator came to meet employers who, in economic crisis, will be able to choose one of the two options described above. The choice of a measure or the other will depend on the employer's impasse. Thus, we can not say that a measure is better than the other one without examining the specific situation of the plant. If the plant is in the process of reorientation of its activity because of reduced orders, for example, we believe that the employer will prefer the case provided by art. Article 52 line 3 of the Labour Code. In contrast, in the case of total loss of orders over a certain period, he will choose situation referred to in art. 53 of the Labour Code.

But if we consider the effects produced by the suspension regulated by Article 52 line 3 of the Labor Code on the employees, we can say that the measure is, in fact, a case of unilateral modification of the individual labor contract. Thus, both the employee's wages and working hours are unilaterally changed, the essential elements of the individual labor contract. In that case, the provisions of art. 41 line 2 of the Labour Code apply, according to which 'exceptionally,

the unilateral modification of the individual labor contract is possible only in the cases and under the conditions provided for in this code." However, the unilateral suspension regulated by Article 52 line 3 of the Labour Code is the exception to the principles of limiting the right to work and respecting good faith with the conclusion, performance, suspension and termination of individual and collective labor contracts (Article 3 and Article 8, line 1 of the Code).

In conclusion, under conditions of economic crisis, it is natural that employers have the necessary means to efficiently organize their activity, meanwhile keeping its staff on these periods. This does not mean that, during the suspension period the employees can not resign, no need to terminate the suspension provided for in Article 52 line 3 of the Labour Code in order to intervene in the individual labor contract termination. From the employer's perspective there is no ban imposed to him by art. 60 of the Labour Code in relation to this type of suspension, so that the latter may proceed to dismiss the employee during the unilateral suspension of his labor contract arranged under Article 52 line 3 of the Labour Code.

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