

PATRIMONIAL RESPONSIBILITY OF THE EMPLOYER. CRITERIA FOR EMPLOYEE DISCRIMINATION

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Abstract

Labour jurisdiction represents the institution required to apply legal procedures by the means of competent bodies to resolve conflicts among employees and employers concerning the conclusion, performance or termination of employment. The application of labour jurisdiction procedures are related to the special nature of labour relations aimed at protecting the rights and interests of employees. The article details the procedural means to resolve individual labour conflicts in matters related to the compensation of material and moral prejudices of the employer resulted from the infringement of the legal duties of the employer in terms of violating the equal treatment and discrimination principle. There are also detailed the discrimination concept in labour relations, applicable law, legal effects as well as applicable discrimination criteria.

Keywords: *patrimonial, responsibility, contestation, criteria, discrimination.*

JEL Classification: K31

1. Introduction

As concerns the regulations on labour conflict the provisions of Article 267 of Labour Code states the parties involved in labour relations are the employees as owners of rights and obligations of labour relations, as well as the employers², legal entities benefiting by the paid labour, temporary labour agents, users, and public institutions.

At one hand, in order to obtain the status of parties in a labour dispute, the law does not require that the employee and employer to be in a contractual relationship that takes place during the trial of the case; it is also assimilated the situation of former employee and employers conditioned by the existence of previous labour relations. On the other hand, the Code of Civil Procedure attributes the status of parties in the trial not only to the complainant or plaintiff but also to the third parties with procedural interests because under the European Convention on Human Rights³ any person whose rights and freedoms have been violated must provide access to a national court.

Functional competence⁴ of labour conflicts' settlement in accordance with the dispositions of Article 269 of the Labour Code corroborated with Art. 95 of the Code of Civil Procedure belongs to the courts and the material and territorial resolution conclusion, modification, execution, suspension or termination of individual employment contracts belongs to the tribunal in whose jurisdiction the applicant resides or stays; it is also possible the active procedural co-participation⁵.

In the employment relationship, the employee may be subject to different treatment than other people who have a comparable position, based on different criteria of discrimination that have the effect of excluding certain rights or freedoms, which paves the way for work conflict.

Specific to the labour jurisdiction is reversing the proof task in labour disputes; the provisions of Article 272 of the Labour Code requires to the employer to submit evidence in defence until the first day of the trial. The existence of acts of discrimination in employment relationships causes the employer's obligation (Decision No. 48/2011 of the Constitutional Court – the employer holder of conclusive evidence) as defendant to prove the non-existence of any acts of discrimination or the lack of infringement of the equal treatment principle. On the other hand,

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² Țiclea Alexandru, *Tratat de dreptul muncii*, Universul juridic, Bucharest, 2015, p.1034.

³ Chiriță Radu, *Convenția europeană a drepturilor omului*, C.H. Beck, Bucharest, 2008, p.34.

⁴ Vasile Andreea, *Excepțiile procesuale*, Hamangiu, Bucharest, 2013, p.56.

⁵ Țiclea Alexandru, *op.cit.*, p. 1048.

neither employee position that is considered subjected to acts of discrimination should not be passive; he/she has the obligation to prove a difference in treatment.

Procedurally, the parties have access not only to the support of their claims to the trial court, its decision is likely to be appealed⁶ by ordinary means of appeal, by reform which suspends the law enforcement and by extraordinary means of appeal, litigation for annulment or revision.

2. The employee's right of appeal against acts of discrimination

The constitutional right of the person not to be subjected to any discrimination was taken into employment relationships primarily by the provisions of articles 5 and 6 of the Labour Code. Thus, article 5, paragraph 1 of the Labour Code stipulates that in the labour relations principle of equal treatment between employers and employees will operate, and in paragraph 2 of the same article is provided that any direct or indirect discrimination against an employee is forbidden. By reading these texts of law one can see that in the national legislation the grounds of discrimination are not limitative because provisions of Article 5, paragraph 2 of the Labour Code which refers to the criteria of discrimination based on gender, sexual orientation, genetic characteristics, age, nationality, race, colour, ethnicity, religion, political opinion, social origin, disability, family status or responsibilities, membership in a union or syndicate activity, complement those of paragraph 4 which establish indirect discrimination by acts and deeds based on criteria other than those mentioned above, but which can effect as direct discrimination.

Article 39, paragraph 1, letters a, d and e, and Article 159, Paragraph 3 of the Labour Code enshrines the rights of the employee to equality of chances and treatment, dignity in employment and payroll, stating criteria of discrimination. Likewise, the provisions of Article 59, letter a, of the Labour Code prohibit dismissal of employees on grounds of gender, sexual orientation, genetic characteristics, age, nationality, race, colour, religion, political opinion, social origin, disability, family status or responsibilities, membership or activity union, stating the grounds of discrimination.

As a result, the main settlement in matters of discrimination is the G.D. no.137/2000 on preventing and sanctioning all forms of discrimination, the Labour Code representing the accounting framework, ordinance which in Article 1, paragraph 2, guarantees the principle of equality between citizens, and exclusion of privileges and discrimination. The concept of discrimination is defined as any distinction, exclusion, restriction or preference, specifying the applicable criteria, namely race, nationality, ethnicity, language, religion, social category, beliefs, genre, sexual orientation, age, disability, chronic non-contagious disease, member of a disadvantaged category, etc. Also, the ordinance's provisions on grounds of discrimination are not limitative because reference is made to any other criteria that have as effect restriction, prevention of recognition, use or exercise, in conditions of equality, of human rights and fundamental freedoms or rights recognized by law in the political, economic, social and cultural or any other field of public life.

On the other hand, Article 1, paragraph 2, letter e, item (i) of the Ordinance stipulates that the principles of eliminating discrimination are the right to fair working conditions, egalitarian measures of protection against unemployment, equal wages for equal work, and the right to just and satisfying remuneration of employees.

For the purposes of defining the criteria applicable to discrimination, the Ordinance introduces the concept of victimization as a form of adverse treatment applied to the employee, treatment related to a possible complaint or legal action regarding the violation of the principle of equal treatment and non-discrimination brought by it.

Regarding legal protection against discrimination in dismissal case, Articles 65 and 66 of the Labour Code provide that the employee prejudiced by the employer due to the issuance of an

⁶ Tăbărcă Mihaela, *Drept procesual civil*, Universul Juridic, Bucharest, 2005, p. 81.

unlawful decision of dismissal based on discrimination may enter appeal against it, seeking the annulment, requesting to the employer to pay compensation equal to the indexed, increased and updated wages, moral damages, reinstatement to the position previously held before the employment contract is terminated or the payment of duties without reintegration.

Enrolling in the decision of dismissal by which the employer notifies the employee about the termination of the individual employment contract for reasons not attributable to him/her, the period of notice, as well as a description of jobs available in the respective organization and the time the employee should opt for these new employment does not constitute elements suffice for the purposes of its admissibility, given that the basis for its issuing are found criteria of direct or indirect discrimination.

Thus, for the concept of discrimination, both in communitarian and in the national law⁷ is required the existence of a different treatment when the concerned persons are in a comparable situation. As a result, restrictions or exclusions to a particular person to overlap the concept of discrimination should at least have the effect of reducing if not totally exclude certain rights.

From the point of view of discrimination criteria, in accordance with article 5, paragraphs 1 and 2, of the Labour Code, any direct or indirect discrimination against an employee is prohibited, resulting in denial or restriction of rights under the labour laws. As regards direct discrimination, the Labour Code requires the existence of certain discriminatory criteria, something that does not appear in the case of indirect discrimination when any criteria producing the effect of direct discrimination are allowed. Also, Article 6, Paragraph 1, of the Labour Code complements above mentioned provisions stipulating that any employee should enjoy protection of their rights without discrimination.

For the purposes of G.D. no.137/2000 on the legal protection against acts of discrimination, contravention liability of the employer is established and the opportunity to ask the discriminated person to request to the National Council for Discrimination Combating - CNCD to eliminate the consequences of discriminatory acts. On the other hand, in the case of discrimination in the employment relationship, the employee submitted by the employer to acts of discrimination can address the court in a separate document, either with the appeal against the dismissal decision for the purpose of obtaining compensation by the means of legal action. Thus, under Article 27 (1)*, the person subjected to acts of discrimination may apply to the court within 3 years from the date of the deed, which is not dependent on reporting to CNCD, by which the employee may request cancellation of the situation created by discrimination, restore to the previous situation, and compensation for the damages.

Procedurally, the employees who consider themselves prejudiced will be obliged to present facts that presume the existence of direct or indirect discrimination, being allowed any evidence, and the defendant employer assumes the obligation to prove that there has been not taken place a violation of the principle of equal treatment.

3. Study case

The petitioner sought the annulment of the dismissal decision without re-entering on the job, compelling the employer to pay an amount representing due and not granted salary rights, namely the difference in dismissal indemnity, and moral damages suffered as a result of discrimination.

In fact, the complainant was an employee of the employer, as resulted of the terms of the individual contract of employment, being employed in a job included in accordance with the applicable Labour Collective Agreement in the list of jobs with heavy duty which was supposed to give a bonus for difficult working conditions in the percentage of 10-35%. According to the Labour Collective Agreement, the employees were to benefit from additional leave of at least 3 working days due to labour supply in arduous jobs, vacation and bonuses not being awarded by the employer. The foundation of petitioner's action was related to the fact that, as a result of

⁷ Muscalu Loredana Manuela, *Discriminarea în relațiile de muncă*, Hamangiu, Bucharest, 2015, p.1.

termination of employment, the defendant issued a dismissal decision without considering the entitlements that the employee should enjoy legally.

On the other hand, the employee was subjected to indirect discrimination because of the practice of employer unjustified by a legitimate aim to lay off those employees who previously filed legal action against the employer. These actions were intended to infringe the right to equal treatment.

Clearly, the aim of the employer by issuing the dismissal decision was linked to an attempt to remove only undesirable employees given that among the parties were conducted several trials before courts. These trials were intended to obtain certain financial rights, ended with the order to the defendant to pay in all of these rights.

In this case, after the employees obtained some favourable judgments, the employer issued an address communicating to all employees and requiring them to give up the rights they won in court or the owed amounts they have already come into possession by compelling the employer to repay these amounts. The employer directly indicated to the employees how to return these amounts and procedure required for the cancellation of the trial if processes are still before the courts.

As a result of the petitioner employee's refusal to follow these requirements, he has been notified to present to the Department of Human Resources of the employer, where he was informed that the post he occupied will be disestablished. The applicant subsequently addressed by means of a written declaration⁸ both to the syndicate he was a member and to the employer, stating his professional results in recent years, results that place him among the top employees in his field of activity, noting that his dismissal does not have any legal basis.

Subsequently, the complainant was notified again to attend a meeting in the Department of Human Resources, where an intern offer of transfer to another post was communicated to him, an offer acceptable to him and therefore an addendum to his individually employment contract followed. The employer company has not yet concluded and communicated a new job description, paper that should have comprised compulsory tasks and risks that include the respective job. Later, shortly, the complainant was informed by a decision of his individual termination of employment on the grounds of dismantling the new post following the reorganization of the employer's activity.

On the one hand, discrimination has been linked inclusive by the employer's refusal to give effectively to the dismissed employee another job compatible with his professional background. This obligation of the employer to provide a new job in the same subunits, then to the level of the branch, subsidiary or economic entity originated from the provisions of the applicable Labour Collective Agreement. Under an alleged legality, the employer annexed to the dismissal decision a list of vacancies, with the obligation of the employee to opt for one of them within 3 days from the notification date. However, although the plaintiff timely notified to the employer his option to be reassigned, this has not led to the occupation of another vacancy. The employer stated that the redeployment option of the employee had no effects due to not using the method of notification using internal procedure by intranet, the option being submitted in person at the Human Resources Department, when such notification procedure was not found in any act of that unit's internal circuitry.

On the other hand, in the dismissal decision issued by the employer was established a compensation for the dismissal in an amount inconsistent to the provisions of the Social Plan and of the Convention concluded between the parties. In fact, the compensation paid to the complainant was valid for the year preceding the dismissal decision, following to be renegotiated for the current year, renegotiation performed previously to the set deadline due to a lack of representativeness of the syndicate. Following the renegotiation, a 15% increase in the allowance for dismissal was determined that would apply throughout the year in progress. The employer refused this payment on the grounds that the new value would apply only from the date of renegotiation until the end of the year and the dismissal decision was issued that year, but before renegotiation.

⁸ Dimitriu Raluca, *Contractul individual de muncă, prezent și perspective*, Tribuna Economică, Bucharest, 2005, p. 327.

The motivation of the employer with the application of leave indemnity growth only from the date of renegotiation and not for the entire calendar year, however, was unlawful because it introduced a condition discriminating between employees dismissed during the same year, but on different dates. Leave indemnity yearly reconsideration in order to update represented a condition necessary to the existence of an egalitarian indemnity in terms of its timely application for all fired employees.

Discriminatory behaviour of the employer applied to the employee in order to evade his legal obligations, required court intervention seeking the annulment of the dismissal decision and to compel him to pay a sum as moral compensation.

The evidence consisted of documents submitted by the parties, and the administration of proof with accounting payroll legal expertise, with the objectives to classify the employment place of the complainant among the jobs with difficult conditions in accordance with the Labour Collective Agreement calculating the amount of allowances that the complainant was deprived of, and the existence of the entitlement to additional leave and holiday payment. Since the administration of proof with expertise showed that to the amount of compensation for dismissal of which was private the plaintiff there was a difference in compensation that bonuses should be paid for hard working conditions in accordance with LCA and depriving the employee of extra pay holiday.

Court decision to admit the employee petitioner's request was attacked by employer appeal. The critics regarded the existence of contradictory reasons, respectively the enrolment in the reasoning of the judgment of some passages from the expertise report held in the cause, the court settling its decision solely on these clarifications totally excluding the documents in the file. Also, the employer⁹ called ICJ to transfer the case to another court for reasons of legitimate doubt, indicating¹⁰ the existence of a monopoly of experts in labour organization and salary specialization, given that only two experts have hundreds of cases of labour rights in a geographical area, and their conclusions in similar cases¹¹ were identical. It was provisioned that even at national level there is a real monopolization of evidence by the presence of only six experts in the labour specialization, conditioning the existence of a fair trial under Article 6 of the European Convention on Human Rights¹².

The employer criticized the fact that the court considered unfounded that the applicant's job permit granting bonuses for difficult conditions, noting that these allowances would have been taken into the salary base, but without proving in supporting these claims that between the employee and the employer there was a negotiation, according to the Labour Code, which would have allowed the introduction of allowances in the basic salary.

One last criticism was applying the Convention to amend the Social Plan, given that the trial court recalculated the dismissal pay of the complainant employee considering it should have allocated an equal amount to all employees for the year when the dismissal decision was issued regardless of the actual date of its issue. The employer argued that the trial court could not preclude the parties a certain convention when it has not been directly negotiated between the parties¹³ and the expert does not have the powers to rule on points of law. In fact, in the cause has been parties' negotiation, namely employers and employees by the means of representative syndicate, following which it was agreed to update dismissal allowances, the syndicate issuing a subsequent memo to employees that mention the increase of the amount of compensatory payments by 15% since previous year.

An appeal lodged by the employer was admitted, the sentence given to the fund being modified in all, considering that the basic court could not be linked to solving the conclusions of an

⁹ Tăbărcă Mihaela, *Drept procesual civil*, Universul juridic, Bucharest, 2005, p.76;

¹⁰ Ciobanu Viorel, Boroî Gabriel, (2009), *Drept procesual civil*, C.H.Beck, Bucharest, 2009, p.159;

¹¹ Spineanu-Matei Octavia., Moglan Raluca, Ivanovici Laura, Barna-Prisăcaru Mihaela Ioana, Matei Ion, Eftimie M Marius, *Cartea de cereri și acțiuni*, C.H.Beck, Bucharest, 2008, p. 45;

¹² Chiriță Radu, *Convenția europeană a drepturilor omului*, C.H. Beck, Bucharest, 2008, p. 191;

¹³ Ciobanu Viorel, Boroî Gabriel, (2009), *Drept procesual civil*, C.H.Beck, Bucharest, 2009, p. 386;

expert report, because this proof represents only a reason of conviction left to the discretion of judge must prove their own analysis of the submissions of the parties.

As a result, in the case was brought the appeal for annulment¹⁴ motivated by art. 6 of the European Convention on Human Rights, namely breach of the right to a fair trial, that becomes incident when procedural parties have the possibility to manage some evidence *effectively* examined by the court, which requires that the arguments raised by the appeal court to be clearly reflected in its judgment (Case *Burza vs. Romania* of 12.02.2008). The provisions of Article 6, and the concept of fair trial, extend on equality of arms and conditions the motivation of decisions of national courts by their compulsion in case of re-administration and reinterpretation of evidence to directly inform the interested parties (Case *Ieremeiov vs. Romania* - 4637/24 November 2009), to the contrary is allowed to use freely the annulment appeal¹⁵.

The criticism of the appeal court had as motivation the rejection of the expert report on the grounds that the expert's opinion does not bind the trial court and is optional for this, which paved the way for the annulment appeal. It is considered that the right to a fair trial requires that a judge of a superior court can censure the opinion of another judge of a lower court, without however to be able to substitute technical expert in assessing a situation.

4. Conclusions

Under the provisions of Article 253, paragraph 1, of the Labour Code, the employer's responsibility is established under the principle of civil contractual liability for damage or injury caused to the employee by employer's negligence.

The employer disrespect of Articles 65 and 66 of the Labour Code, respectively issuing a dismissal disposition for reasons not related to the employee in illegitimate conditions gives the right to the employee not only to request by the means of appeal the respective decision to be annulled with or without reintegration in the previous job, but also compels the employer to pay a compensation equal with the indexed salaries, as well as to cover the moral prejudices caused by the existence of discriminating facts.

When from the administration of the proofs come out the existence of discriminating facts, the court can decide to oblige the employer to pay compensation in a quantum corresponding to the prejudice suffered by the employee. The victim of the discrimination may invest the court with an action of claims, in a separate document, or as one element of the appeal against the dismissal decision, in order to annul the illegal situation created.

In the cause, from the above analysis of the situation, we find that we are in the presence of an aggravating phenomenon of discrimination, namely multiple discriminations. Basically, multiple discriminations occurs while the more grounds for discrimination are found for the same people; there is not a single criterion applicable. On the other hand, the effect of the existence of differentiated grounds of discrimination ultimately determines differentiated treatment of the employee, although his situation was comparable to that of other employees of the employer.

Thus, in terms of the existing discrimination criteria in question, multiple discriminations implies discrimination thereof based on different criteria, in the cause being considered that there was both a direct discrimination on equal pay, and an action of employee victimization.

In this case, the petitioner employee that was working within an included job, in accordance with Labour Collective Agreement applicable in the list of jobs with heavy duty, the situation assuming granting a bonus for difficult working conditions in the percentage of 10-35 %, and an additional leave of at least 3 working days, has been subjected to discrimination regarding equal pay. The existence of the act of discrimination is proved by the fact that in the dismissal decision

¹⁴ Spineanu-Matei Octavia., Moglan Raluca, Ivanovici Laura, Barna-Prisăcaru Mihaela Ioana, Matei Ion, Eftimie M Marius, *op.cit.*, p. 121.

¹⁵ Theohari Delia Narcisa, Ilie Camelia Maria, Bîrlög Mădălina Andreea, Cristea Bogdan, *Acțiunile civile și taxele judiciare de timbru*, Hamangiu, Bucharest, 2012, p. 56.

issued by the employer was established compensation for dismissal in an amount inconsistent to the provisions of Social Plan and Convention concluded between the parties which is in fact valid only for the year preceding the dismissal decision, the real renegotiated value applicable to actual date of dismissal being grown with a 15% percentage. As a result, between employees who had a comparable legal situation, the employer has applied the discriminatory criteria against the provisions of G.D. no.137/2000 and of the Labour Code.

On the other hand, the employee was subjected to indirect discrimination because of the practice of employer unjustified by a legitimate aim to lay off those employees who previously filed legal action against the employer, actions intended to infringement of the right to equal treatment.

We appreciate that in this case there was a form of multiple discrimination based on several criteria of discrimination taking place both the exclusion of the employee from the payment of the owed duties and the restriction of his possibility to choose and occupy another job in the employer structure corresponding to his training and education, which was differentiated treatment of other employees in comparable situations.

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