THEORETICHAL AND PRACTICAL ASPECTS REGARDING THE CONTENT OF THE DISMISSAL DECISION

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Abstract

Even if 18 years have passed since the adoption of the Romanian Labor Code, in the practice of legal labor relations there are many situations in which employers have major difficulties in establishing the correct content of dismissal decisions. Irregularities in the resolution of individual labor disputes often lead to the annulment of dismissal decisions by the courts. We have proposed that, in the content of this material, we identify and analyze the conditions under which a dismissal decision can be drawn up under legal conditions.

Keywords: *individual employment contract, legal employment relationship, termination of the individual employment contract, dismissal, dismissal decision, motivation of the dismissal decision, annulment of the dismissal decision, individual labor dispute*.

1. Introduction

The dismissal of employees is regulated by the Romanian Labor Code (Law no. 53/2003, republished[1], with subsequent amendments and completions[2]), from the perspective of manifesting the principle of legality, the legislator's option being to allow the employer to dispose unilaterally (as an exclusive expression of his will legal) termination of the individual employment contract only in the cases and under legally defined conditions[3].

In this context, the application of the rules of common law regarding the general regime of termination of the civil contract by unilateral termination (art. 1.321, art. 1.276-1.277, art. 1.552 of the Civil Code) is, in principle, excluded. This is because the specific requirement deduced from art. 278 para. (1) of the Labor Code, regarding the possibility of "completing" the provisions of the Labor Code (and, by extension, of labor law as a whole) with those of civil law only if there is a compatibility of the latter with the specifics of labor relations[4].

It is therefore necessary, both in the course of the procedural steps specific to each dismissal case and in the process of concretely establishing the content of the dismissal decision (by reference to the operating dismissal case)[5], that the employer complies exactly with the substantive and formal requirements provided by the Labor Code, the lack of fulfillment of any procedural condition or its non-compliant fulfillment may lead, as a rule, to the annulment of the dismissal decision.

There is thus a strong need in the practice of employment relationships to identify, in an analytical way, all the content elements of the dismissal decision, depending on the operating hypothesis, and to explain, in a complete way, the reasons whose manifestation determined the employer to finally order the termination of the individual employment contract by dismissal.

2. Legal characterization of the dismissal institution

A. We consider as useful the legal characterization of the dismissal institution from a theoretical perspective, starting from the overall observation of the regulatory solutions retained by the legislator[6]. As a starting point in this approach, art. 58 para. (1) of the Labor Code, defines dismissal as

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[1] In the "Official Gazette of Romania", part I, no. 345 of May 18, 2011.

[2] The last legislative intervention in this regard (by reporting at the time of finalizing the drafting of this material – 22nd of April 2021) was made by Law no. 298/2020 for the amendment and completion of Law no. 53/2003 - Labor Code, published in the "Official Gazette of Romania", part I, no. 1293 of December 24, 2020.

[3] See I.T. Ștefănescu, Theoretical and Practical Treaty on Labor Law, 4th edition, revised and added, „Universul Juridic" Publishing House, Bucharest, 2017, p. 464.

[4] From the strict perspective of the possibility of revoking the dismissal decision by the employer, the High Court of Cassation and Justice retained, by Decision no. 18/2016 (published in the "Official Gazette of Romania", part I, no. 767 of September 30, 2016), that in the interpretation and application of the provisions of art. 278 para. (1) of Law no. 53/2003 - Labor Code, republished, with subsequent amendments and completions, the provisions of art. 1,324, 1,325 and 1,326 of the Civil Code, republished, can be applied in full of the provisions of the Labor Code, being compatible with the specifics of labor relations; in the interpretation of art. 55 lit. c) and art. 77 of the Labor Code, the dismissal decision may be revoked until the date of its communication to the employee, the act of revocation being subject to the communication requirements corresponding to the act it revokes (dismissal decision).

[5] A. Țiclea, Dismissal Decision, in "Romanian Journal of Labor Law" no. 3/2003, pp. 13-17.

[6] Normative solutions that, during the last 18 years since the entry into force of Law no. 53/2003 - Labor Code, remained almost unchanged, proving in this way, against the background of the strong manifestation in practice of some hesitations and doubts, the difficulty for the legislator to intervene to remedy a series of obvious inaccuracies.

representing the termination of the individual employment contract at the initiative of the employer.

The characteristic legal features of the dismissal institution are, in our opinion, the following:

a) dismissal is a unilateral legal act subject to communication (the provisions of art. 1326 of the Civil Code, which are applicable as a common law being incidental), its author being exclusively the employer;

b) dismissal is a causal legal act[7]; the measure ordered by the employer, having as specific result the termination of the individual employment contract on his own initiative, it implies the existence of the cause by necessary reporting to the reasons for dismissal;

c) the legislator's option is to regulate in the Labor Code imperative and restrictive (limiting) the hypotheses in which the employer can order the dismissal and the conditions in which the dismissal can be ordered; this way of regulating constitutes an embodiment, in the matter of the termination of the individual employment contract, of the stability in work and of the legal protection of the right to work;

d) no other situations of unilateral termination of the contract are applicable, among those resulting from the corroboration of art. 1321 C.civ. with art. 1552 para. (1) C.civ. (unilateral termination of the civil contracts); It should be emphasized that the parties to the individual employment contract may not agree - by contract, at its conclusion, or by an addendum concluded during the existence of the contract - that the employer be granted the legal possibility to order the unilateral termination of the individual employment contract in other situations than those expressly and exhaustively provided by the Labor Code;

e) regardless of the case of dismissal and the number of employees affected by the measure ordered by the employer, the dismissal decision is an individual act; how many employees are fired, as many dismissal decisions will have to be issued by the employer;

f) the dismissal must meet, cumulatively: the general substantive conditions regarding capacity, consent, object and cause; the special requirements provided by the Labor Code; the specific condition of form - the written form of the dismissal decision - is an *ad validitatem* requirement;

g) as a rule, for dismissal cases that do not imply the existence of the employee's guilt condition, legal measures are established to protect employees, such as: providing a vacancy corresponding to the employee's training or, as the case may be, with his work capacity; the request by the employer, prior to the issuance of the dismissal decision, of the support of the territorial employment agencies in order to redistribute the employee; active measures to combat unemployment; a notice period, which may not be less than 20 working days; money (or other material) compensations;

h) regardless of the dismissal hypothesis, the (former) employee is entitled to challenge in court the measure ordered by the employer; the employee may request, within this procedural step, the annulment of the dismissal decision, the restoration of the parties to the situation prior to the communication of the dismissal decision, the payment by the employer of some compensations (material, as a rule, but also possible to repair a non-pecuniary damage).

B. There is no perfect overlap between "dismissal" as *negotium iuris* and "dismissal decision", given that the issuance of the dismissal decision by the employer is only the final (and formal) stage of expressing the legal will of the author of the act. The dismissal thus corresponds, in all cases, to a time interval between the moment when the employer was notified about the circumstance (manifestation of a factual situation) that can be included in one of the dismissal hypotheses provided by art. 61 or, as the case may be, art. 65 of the Labor Code.

Concretely and concisely presented, these factual situations are the following:

- the possible commission by the employee of an act which may be qualified as a serious disciplinary offense or the commission by the employee of several acts which may be qualified as repeated disciplinary offenses;

- the employee is absent from work for more than 30 calendar days, due to the disposition of the measure of pre-trial detention or house arrest;

- the non-compliant conduct of the employee in the exercise of his/her duties, possibly determined by the manifestation of a physical and/or mental incapacity, such as to no longer allow him/her to fulfill his/her duties corresponding to the job occupied;

- the non-compliant conduct of the employee in the exercise of his/her duties, possibly due to the manifestation of a professional misconduct;

- the existence of one or more reasons, unrelated to the person of the employee, which would justify the termination of the job held by that employee.

We referred to these circumstances because the employer, in the motivation of the dismissal decision, will have to highlight in the content of the act (as a rule) detailed references in relation to the factual situation of which he became aware and, if applicable, which he analyzed it in a specific legally established procedural framework.

3. Motivation of the dismissal decision

A. The motivation of the dismissal decision is similar, from the perspective of the logical-legal operations necessary to be performed in order to establish the final form of the act, with the motivation of the court decision. Like the judge in drafting the jurisdictional act we referred to, the employer is legally obliged to comply with the requirements regarding the structuring of the content of the dismissal decision (as a formal step) and to indicate the factual and legal

[7] G. Boroi, C.A. Anghelescu, *Civil Law Course. General Part*, 2nd Edition revised and added, "Hamangiu" Publishing House, 2012, p. 125.

reasons that determined the dismissal "solution" (as a substantive element).

Among the content elements of the dismissal decision, common to any hypothesis of dismissal among the five regulated by the Labor Code, the factual motivation of the decision and, in many cases, the correlation of the factual reasons with their legal classification proved to be for employers some of the most problematic steps specific to the proper management of labor relations.

The errors which manifested themselves - and which, in a significant number, still manifest themselves - led, in the event that the decision was challenged in court, to the annulment of the act and, hence, to the most unpleasant consequences for employers, especially when the issue of restoring the parties to the previous situation was raised by reassigning the illegally or unfounded dismissed employee to the position held prior to the disposition of the measure of termination of the individual employment contract.

B. From a practical perspective, the factual motivation of the dismissal decision is necessary to include all the elements specific to the manifestation of that circumstance which may represent one of the causes of dismissal provided by art. 61 and art. 65 of the Labor Code.

a) In the case of disciplinary dismissal, based on the provisions of art. 61 and art. 248 para. (1) lit. e) of the Labor Code, it is necessary to point out that, according to art. 252 para. (2) lit. a) of the same Code, in the content of the decision there must be the very "description of the deed that constitutes a disciplinary violation".

This option of the legislator, different from the one found in the factual motivation of the other types of dismissal decision, presupposes that the employer does not save in presenting all the specific coordinates specific to the occurrence of the misconduct or, as the case may be, to disciplinary misconducts (if the employer has found that the employee has committed two or more acts which constitute culpable breaches of his obligations).

Both the doctrine[8] and the jurisprudence have consistently held that the "description of the deed" in a consistent manner presupposes:

- indication of the factual situation in its materiality, and not in the form of generalities or vague, unverifiable statements, which correspond to a detail of the imputed deed/deeds;

- the explicit presentation of those aspects that may lead to the conclusion that the act of the employee represents a violation of the norms of work discipline;

- individualization in time of the disciplinary violation, otherwise the court cannot verify the observance by the employer of the legal provisions regarding the terms provided by art. 252 para. (2) of the Labor Code;

- indication of the essential elements for individualizing the act imputed to the employee, the date or period of time in which it was committed, knowing that any act of a person takes place in a certain time and place, the spatial and temporal limits characterizing any action, or human inaction, in their absence the existence of a deed cannot be conceived[9].

Along with these useful landmarks, the description of the deed that constitutes a disciplinary violation may also involve:

- specifying that the act constituting a disciplinary violation was committed through a singular manifestation, which corresponds to the possibility of fixing in time and space its production, or, as the case may be, the disciplinary violation is presented as an act committed in a continuous form;

- the fact that the act was committed by the employee as the sole perpetrator or that the act was committed by the sanctioned employee together with one or more colleagues, or with one or more persons who do not have the status of employee of the employer ordering the measure;

- an indication of all the elements and circumstances which, in connection with the manifestation of the factual situation, justify the employer's choice to classify the disciplinary misconduct as a serious one (in which case it is legally possible to apply the most severe disciplinary sanction);

- correlation of the determination of the concrete content of this structural element of the disciplinary sanction decision - "description of the deed" - with the objective circumstantial landmarks (those provided by art. 250 of the Labor Code and, possibly, others established by the applicable collective labor agreement or, in its absence, by the internal regulation); we refer to the "circumstances in which the act was committed" and the "consequences of the disciplinary violation";

- highlighting those factual circumstances that justify the retention by the employer of a certain form of guilt with which the employee committed the disciplinary offense (intent or fault).

The following options do not comply with the requirements of making a proper description of the act that constitutes a disciplinary offense:

- the presentation in the decision exclusively of the statement that the act imputed to the employee consists in breach of one or more provisions of labor law, of the applicable internal regulations or collective bargaining agreement, or non-compliance with one or more obligations arising from the individual employment contract, orders and the legal provisions of the hierarchical managers (in the form of expressions

[8] I.T. Ștefănescu, *op. cit.*, p. 523 and p. 857; A. Țiclea, *Labor Law Treaty. Legislation. Doctrine. Jurisprudence*, 8th Edition, revised and added, "Universul Juridic" Publishing House, Bucharest, 2014, pp. 777-779.

[9] Bucharest Court of Appeal, Section VII for cases regarding labor disputes and social insurance, Civil Decision no. 1180/2020, in the "Romanian Journal of Labor Law" no. 3/2020, pp. 220.

such as: “Disciplinary violation consists in non-compliance by the employee with art. 112 of the Labor Code”, given that the employer had found that the employee did not comply with the work schedule);

- the use of generic and in no way circumstantial wording, such as the employee's manifestation of a "non-compliant attitude towards the direct hierarchical boss" or of an "irreverent attitude towards another person" or "repeated non-performance of duties";

- a description - even in detail - of an act which cannot constitute a disciplinary offense (for example, the employer has retained as a disciplinary offense an act of the employee who, outside the actual course of work, gave an interview in which, the right to an opinion, referred to some negative aspects that manifest themselves in the field of activity to which the employer belongs[10]).

From a documentary point of view, we share the opinion according to which the requirement established by art. 252 para. (2) lit. a) of the Labor Code is complied with by the employer in the situation where the dismissed person has become concretely and certainly aware of the facts invoked for dismissal (such as a report or report)[11]. We specify that, at present, it is necessary to attach that document to the dismissal decision and that this mode of operation is mentioned in the decision itself (using, for example, a formula such as: "The description of the act which constitutes a disciplinary presented in the report annexed hereto, by which the undersigned was notified in connection with the deeds committed by the employee”).

The requirement to describe the act constituting a disciplinary offense as a mandatory content element of the disciplinary dismissal decision must be correlated with the content of the final report of the disciplinary investigation (the act of "disinvestment" of the person who has been appointed to carry out the disciplinary investigation or of the disciplinary investigation commission). We refer to the need for the deed described in the content of the decision to be identical to the one that was investigated disciplinary. One or more facts that have not been the subject of disciplinary investigation cannot substantiate the application of the sanction consisting in the disciplinary termination of the individual employment contract, given the violation of art. 251 para. (1) of the Labor Code, even if regarding this or these (uninvestigated) facts the employer would comply with all the requirements corresponding to a compliant description.

b) If the employee is fired as a result of pre-trial detention or house arrest for a period longer than 30 days, under the Code of Criminal Procedure [hypothesis regulated by art. 61 lit. b) of the Labor Code], the content of the dismissal decision is established according to art. 62 para. (3) of the Labor Code. As such, the decision "must be motivated in fact".

The motivation in fact in this situation is limited to the indication by the employer of the interval in which the employee was absent (thus justifying compliance with the requirement that the employee's absence be longer than 30 calendar days) and the manner in which the employer became aware, concretely, of the preventive measure ordered in connection with the employee in question.

The fact of arrest of the employee or his house arrest may be brought to the notice of the employer by using any means of proof to this effect, including by indicating by the employer the information available to any interested person on the court portal (portal. just.ro).

c) The motivation in fact within the dismissal decision ordered pursuant to art. 61 lit. c) of the Labor Code (when, by decision of the competent bodies of medical expertise, the physical and/or mental incapacity of the employee is found, which does not allow him to fulfill his duties corresponding to the job) is a well-founded requirement on the provisions of art. 62 para. (3) of the Labor Code.

Considering also the resolutions given by the High Court of Cassation and Justice by Decision no. 7/2016[12], according to which in interpreting the provisions of art. 61 lit. c) of Law no. 53/2003 - Labor Code, republished, with subsequent amendments and completions, by decision of the medical expertise bodies (which establishes the physical and/or mental incapacity of the employee) is understood the result of the evaluation of the occupational medicine specialist on fitness for work, consisting in the aptitude sheet, uncontested or become final after the appeal, by issuing the decision by the entity with legal attributions in this respect, the factual motivation of the dismissal decision implies in this situation:

- the indication (without the need for detailing) by the employer of the medical condition from which the employee suffers, according to the findings made following the occupational medicine specialist's assessment of occupational fitness, highlighted in the aptitude sheet or in the aptitude sheet and in the issued decision by the county or Bucharest public health directorate, following the contestation of the aptitude file by the employee, pursuant to art. 30 of Government Decision no. 355/2007 on the surveillance of workers' health[13], with subsequent amendments and completions;

- a specific indication of the duties established by the employee's job description, which can no longer be performed properly, and the causal link between the employee's state of health and the fact that his existence no longer allows him to perform those duties.

[10] Bucharest Court of Appeal, Section VII for cases regarding labor disputes and social insurance, Civil Decision no. 1203/2019 (unpublished).

[11] I.T. Ștefănescu, *op. cit.*, p. 523.

[12] Published in the "Official Gazette of Romania", part I, no. 399 of May 26, 2016.

[13] Published in the "Official Gazette of Romania", part I, no. 332 of May 17, 2007.

It is also possible, in this case, for the employer to comply with the requirement to include in the content of the dismissal decision the factual motivation of the measure by attaching to the decision the aptitude sheet or, as the case may be, the aptitude sheet and the decision issued by the management. of public health of the county or of the municipality of Bucharest pursuant to art. 33 of Government Decision no. 355/2007, specifying in the dismissal decision that the document or documents in question constitute its annex.

d) In the case of the dismissal decision based on the provisions of art. 61 lit. d) of the Labor Code (professional misconduct), being applicable accordingly art. 62 para. (3), it is necessary that the employer actually motivates his measure.

The motivation in fact in this situation will include:

- the manner in which the employer became aware of the fact that, as regards the dismissed employee, indications were received that he no longer professionally corresponded to the job in which he was employed, which led to the prior professional assessment procedure [the one in which refers to art. 63 para. (2) of the Labor Code and which is normatively developed by the applicable collective labor contract or, in its absence, by the internal regulation, or - in the absence of both regulatory landmarks - is established by the employer in an *ad hoc* manner];

- how the professional mismatch manifested itself in a concrete way (as the case may be: possible: non-fulfillment of the work norm, defective development of the activity, accomplishment of some works of poor quality[14]); what were the attributions, established by the job description, that the employee did not fulfill in a compliant way and how the result of these non-conformities was manifested;

- what was the time interval in which this non-conformity manifested itself;

- presentation of the way in which the prior professional evaluation procedure was organized and the concrete way in which it was carried out; in this respect, the decision must include references to the person appointed to carry out the professional evaluation or, as the case may be, to the composition of the evaluation committee, the evaluation criteria used, the evaluation method or methods used, the result of the evaluation. and the explanations given by the employee on the occasion of the evaluation and/or on the communication of the result of this approach;

- justification of the impossibility of maintaining the employment relationship, given the serious or significant nature of the professional misconduct in relation to the volume and/or importance of specific tasks that the employee, due to professional misconduct found after the assessment, can no longer perform properly.

e) The content of the decision to dismiss the employee for reasons not related to his person is regulated by art. 76 and art. 63 para. (2) of the Labor Code. According to lit. a) in art. 76, the dismissal decision must contain "the reasons for the dismissal". Correlating this formal requirement with the provisions of art. 65 of the Code, it follows that the reasoning in fact in this case of dismissal implies that the employer has to:

- indicate in detail the reason or reasons unrelated to the employee's person that led to the termination of his / her employment (usually circumstances in the general sphere of economic difficulties, technological changes or reorganization of activity), as well as the causal and temporal landmarks related to the manifestation of the reason or motives in question (why did the respective situations appear, when their manifestation started, the interval in which they manifested, the fact that a moment of the cessation of the manifestation cannot be anticipated their circumstance that they have an irreversible effect);

- specify the manner in which he was informed of the circumstances which manifested itself on the basis of the disposition of the post occupied by the employee (note or report of the functional compartment in which the post was abolished; note or report of the financial department or the human resources department, etc.);

- concretely justify the necessary relationship between the manifestation of the reason or reasons unrelated to the employee and the termination of employment, from the perspective of fulfilling the requirement of the existence of a real and serious cause;

- indicate the internal act (decision or decision of the person or body which has the power to institute measures concerning the organizational and functional structure of the employer's entity) by which the employment has been abolished and by which the establishment plan has been amended accordingly and the employment status of that employer.

4. Conclusions

From the point of view of compliance with the rules on the content of the dismissal decision, an employer must act with the utmost diligence in motivating the dismissal decision and, in general, in drawing up this document on which the existence of the legal employment relationship depends. A possible reserve of economy or detail is not justified in any situation.

[14] I.T. Ștefănescu, *op. cit.*, p. 741.

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