Considerations regarding the rights of employees who were dismissed unlawfully

Lecturer **Roxana Maria ROBA**[1]

Abstract

The present study aims to analyze the consequences of the annulment of the employee's dismissal decision. These concern the employer's obligation to reintegrate the unlawfully dismissed employee and to provide compensation to him, which must include the indexed, increased and refurbished wages and other entitlements to which the employee would have benefited. In addition to these amounts, the employee is also entitled to claim damages for the moral or material damage suffered as a result of the dismissal decision. The content and the way of fulfilling the legal provisions that currently regulate the rights of the unlawfully dismissed employee are of particular importance from the perspective of both the employee and the employer. Thus, from the point of view of the employee, the lack of precisely defined content of his rights can easily give rise to abuse by the employer. With regard to the latter, failure to adequately fulfill its obligations may have drastic consequences, which may also be of a criminal nature. The study uses the logical, historical and experimental method, analyzes the legal provisions currently in force, as well as the point of view of the doctrine and the solutions derived from the judicial practice. The conclusions are in the direction of expressing concrete proposals to amend the current regulations.

Keywords: *dismissal, reintegration, employee, compensation, rights, employer.*

JEL Classification: K31

1. Introductory considerations

Dismissal of the employee is the termination of the individual labor contract at the initiative of the employer and may be ordered for reasons related to the person of the employee or for reasons not related to the employee.

Regardless of the reasons for the dismissal, Art. 80, par. 1 of the Labor Code provides that if the dismissal was done in a non-traditional or unlawful manner, the court will order its annulment and will oblige the employer to pay equal compensation with the indexed, increased and updated salaries and with the other rights that would be benefited the employee.

The study aims to highlight the existing lacuna in the current legislation as regards the rights to the unlawfully dismissed employee and which gave rise to controversy in judicial practice. The topic is topical and important for both employees and employers. Following the views expressed in jurisprudence and doctrine, using the logical, historical and experimental method, the study proposes a

[1] Roxana Maria Roba - Faculty of Economic, Legal and Administrative Sciences, „Petru Maior" University of Targu Mures, Romania, office@avocatroxanaroba.ro .

clear and detailed regulation of the reintegration procedure of the unlawfully dismissed employee and of his rights.

2. Reintegration of the employee: employer's duty to regulate imprecisely

Although the nullity, as a legal penalty, has the effect of returning the parties to the previous situation, given the character of the individual's personal intuition, the return of the parties to the situation prior to the issue of the dismissal act will be ordered only at the request of the employee. Therefore, the reintegration of the employee is not mandatory in all cases, but optional, depending on the employee's option.

If the employee asks for reintegration, the employer must take the necessary steps to do so. However, the Labor Code does not contain regulations in this respect.

Therefore, some employers made decisions to reintegrate employees[2] in order to comply with the judgments. However, it has been emphasized in the judicial practice that the employer has the obligation to prove that effective steps were taken to reintegrate the applicant by carrying out the procedures which depended on him[3].

Thus, as has been emphasized in a case-by-case solution[4], 'the reintegration obligation concerns a legal transaction of retroactive return of the employee in the previous situation, with the effect that the period of unlawful removal of the employee must be removed. Reintegration is always a retrospective legal operation, which is not confused with effective return to work, which is merely a factual situation that is occurring for the future.

Therefore, in order to be able to prove effective reintegration of the employee, the employer has not only the obligation to formally issue and communicate a reintegration decision to the employee. The employer must make effective and genuine reintegration by making available the documents, information and even the indispensable goods for the performance of his / her duties.

The employer's refusal to enforce a court order ordering the reintegration of an employee is the offense of non-observance of a court decision, according to the provisions of art. 287, par. 1, letter d) of the Criminal Code.

---

[2] The doctrine emphasized that it is not mandatory for the execution of the court decision to issue an internal redeployment arrangement by the employer because the judgment is enforceable by itself without depending on any internal formalities of the employer who, as such, can not have legal effects different from those of the enforceable title. To be seen Alexandru Țiclea, *Reintegrarea în muncă-urmare a anulării concedierii*, in „Revista Română de Dreptul muncii" no. 11/2016, p. 18.

[3] See Judgment of the Constanța Court of Appeal, Civil Division I, no. 398 / CM / 2016, published in „Revista Română de Dreptul muncii" no. 2/2017, p. 204.

[4] The separate opinion at the Mures Court of Appeal no. 692/2017 issued in file no. 735/102/2017, unpublished.

3. The enforceability of the first instance decision ordering reintegration

An important aspect is the moment when the court decision on reintegration is enforceable, marking in this respect the date from which the decision must be carried out by the employer.

According to the provisions of art. 274 of the Labor Code, the judgments given in the case are final and enforceable by law. However, in the judicial practice[5] a different point of view has been expressed, according to which, following the adoption of the Law on Social Dialogue and the Civil Procedure Code, the legislator renounced the enforceability of the law and without any differentiation of the judgments in the cases dealing with labor disputes. Therefore, in relation to art. 448, par. 1, pt. 2 and par. 2 of the Proc. the judgments of the first instance are enforceable by law and the enforcement is provisional only when they have as their object the payment of wages or other rights arising from the legal relations of work or compensation for accidents at work.

We do not agree with this point of view. The judgments of the first instance are enforceable by law and in the case provided by art. 448, point 10 of the Civil Procedure Code, respectively in any other cases where the law provides that the judgment is enforceable.

In fact, Art. 278 of the Code of Civil Procedure of 1865[6] contained provisions similar to those currently in force, and there was no controversy as to the enforceability of the rulings given in the resolution of labor disputes. In this respect and in the doctrine[7] it was emphasized that from the correlation of the provisions of art. 214 of the Law on Social Dialogue with Art. 433 and art. 448, par. 1, point 10 of the Proc. civil, it is clear that judgments handed down by the first instance in solving an individual labor dispute are enforceable, irrespective of the subject matter of the application.

Under these circumstances, there is no reason to believe that, with regard to reintegration, the judgments of the first instance would not be enforceable.

However, if the judgments of the court of first instance are legal in character or not, it is also very important in terms of exercising the remedy against the decision of the first instance court. Thus, if the first instance ordered the applicant's application to be admitted, annulment of the decision to dismiss him and his reintegration into the post previously held by the defendant, the enforcement of the first-instance judgment by the employer would lead to the inadmissibility of the promised appeal , if it is judged that the decision of the first instance is not

[5] See the Civil Sentence of the Mures Tribunal no. 692/2017, unpublished.
[6] Published in Brochure of July 26, 1993.
[7] Ion Traian Ștefănescu*, Codul muncii și legea dialogului social. Comentarii și explicații,* Universul Juridic, Bucharest, 2017, p. 509.

enforceable[8]. Otherwise, if the judgments of the first instance are enforceable, enforcement of the judgment will not have such an effect.

In practice, it is not often that the job that the employee has to reintegrate has been abolished. It has been emphasized in the case-law[9] that the reversion of the parties to the situation prior to the issue of the null legal act by reintegration of the contestant into the post and the post held prior to the dismissal must be carried out, and there is no relevance in this respect to the dismantling of the position of the contestant to the dismissal. In this respect, also in the case of Ştefănescu v. Romania[10], there is the refusal of the authorities to reintegrate the contestant on the previously detained post, as a result of the dissolution of the direction in which he and the former ministry worked[11].

If the employee does not request reinstatement in the situation prior to the issue of the dismissal act, the individual employment contract will cease to be lawful on the date of the final judgment.

4. Rights due to the employee unlawfully dismissed

As regards the compensation due to the employee according to art. 80, par. 1 of the Labor Code, it is clear from the wording of this legal text that the court, if it cancels the dismissal decision, will order, even on its own initiative, the employer's indemnity equal to the indexed, increased and updated salaries and the other rights he would have enjoyed employee. Therefore, we are in the presence of an exception to the principle of the availability of the civil process.

Regarding the content of the phrase the other rights that the employee would have benefited from, in the judicial practice it was shown that the employee has the right to be paid also the permanent bonuses related to the salary, but also the non-permanent bonuses, such as the night increase and the increase for the hours worked in non-working days or in public holidays, given that if they had worked, they would have benefited from them[12].

The doctrine also expressed the unglazed point of view, in the sense that, in interpreting the provisions of art. 80, par. 1 of the Labor Code, the employee is not given the money entitlements that impose the effective performance of the activity by the employee (such as working conditions bonuses, night work allowance) [13].

---

[8] In this respect, according to art. 467, par. 2 of the Code of civ. proc., the party that partially enforced the judgment at first instance, although it was not susceptible to provisional enforcement, has no right to make a major appeal on the executed provisions.

[9] See Judgment of the Bucharest Court of Appeal no. 3793 / R of May 31, 2012, published in the "Romanian Journal of Labor Law" no. 7/2012, p. 140.

[10] Published in the Official Gazette, Part I no. 617 of August 22, 2008.

[11] For a legislative proposal in this matter see Ion Traian Ștefănescu, *Tratat teoretic și practic de drept al muncii*, Ed. Universul Juridic, Bucharest, 2010, p. 452.

[12] See the conclusion of the Mureș Court no. 10/2016 issued in file no. 3508/102/2014, unpublished.

[13] Ion Traian Ștefănescu, *op. cit.*, p. 175.

Since the Labor Code does not provide a solution as to where the employee's salary rights are variable, judicial practice[14] has shown that solutions should be sought and found based on the purpose of providing compensation, which is also to punish the employer's unlawful conduct .

We believe that this view is correct and therefore the employee will have to be compensated in the amount equal to all the rights he would have enjoyed if the decision of dismissal was not issued irrespective of their permanent or non-permanent character.

Another problem regarding the rights of the employee unlawfully dismissed concerns the granting of holiday leave.

The provisions of art. 145, par. 4 of the Labor Code lists the situations in which the employee may be found and which are considered to be periods of work (periods of temporary incapacity for work, maternity leave, maternity leave and sick leave).

These legal provisions do not refer to the situation of illegal dismissal, however, according to the provisions of art. 80, par. 2 of the Labor Code at the request of the employee, the court that ordered the dismissal of the dismissal shall restore the parties to the situation prior to the issuance of the act of dismissal.

An effective return to the previous situation[15] can only take place if the employee is also granted the leave to which he would have been entitled in the event that the employer had not issued an unlawful dismissal decision.

It is therefore necessary to grant the employee leave for the period of absence of work for the employer as a result of the decision to dismiss.

However, the granting of in-kind leave could be prevented if the 18-month period provided for in Art. 146, par. 2 of the Labor Code has been fulfilled[16]. The legal provision is likely to protect the employee, preventing the employer from postponing the leave for an indefinite period of time.

Art. 146, para. 3 of the Labor Code stipulates that the compensation in cash of the unpaid leave is allowed only in the case of termination of the individual labor contract. Therefore, considering these legal provisions, it would appear that, in the case of the unlawful dismissal of the employee, compensation for unpaid leave in cash would not be possible.

However, as long as the one-year leave in kind is no longer possible, the only remaining option is to compensate for the leave in cash, otherwise the employee would be deprived of this right. In this respect, it is also the opinion of the doctrine

---

[14] See the decision of the Bucharest Court of Appeal, Section VII for cases concerning labor disputes and social security no. 936 of 23 February 2016, p. 152.

[15] Restitutio in integrum implies that the person concerned, as a result of the cancellation of the dismissal, is in a position to recover all the rights which he has been deprived of by the unlawful act of the employer. See Judgment of the Bucharest Court of Appeal, Civil Section VII, no. 853 / R of February 13, 2014, published in the "Romanian Journal of Labor Law" no. 6/2014, p. 133.

[16] According to this legal provision, *if the employee, for justified reasons, can not make full or partial annual leave to which he was entitled in that calendar year, with the consent of the person concerned, the employer is obliged to grant the leave of absence not carried out within 18 months of the year following that in which the right to annual leave was born.*

that it has been shown that compensation in cash is also allowed when, for objective reasons, the leave could not be made[17].

5. The moral and material damages due to the unlawfully dismissed employee

If the employee has suffered material or moral damages as a result of unlawful dismissal, he is also entitled to the repair.

The applicant's claim will be based on the provisions of Art. 253, par. 1 of the Labor Code[18] regarding the patrimonial liability of the employer and may be submitted together with the appeal against the dismissal decision or separately from it.

The conditions for employing the employer's patrimonial liability are as follows: there is an unlawful act of the employer; the employee has suffered material and / or moral damage during or in connection with the performance of his / her duties and between the unlawful act and the damage suffered by the employee to have a causal relationship.

Material injury is always measurable in money and includes both the actual loss and the unrealized benefit, reported to the provisions of art. 1531, par. 2 of the Civil Code.

The moral injury is the harmful consequence suffered by a person who has no economic value and can not be valued in money, consisting of physical or psychological suffering of the injured person as a result of illicit acts through which personal non-patrimonial rights defining human personality have been violated[19].

As far as the illicit act is concerned, the unlawful dismissal of the employee is one of the situations highlighted by doctrine[20] capable of causing injury to the employee.

Concerning the damage, the question arises whether the burden of proof is on the employer, referring to the provisions of art. 272 of the Labor Code.

If, in terms of material injury, its evidence appears to be easier, one can not appreciate the moral damage in the same way.

Several points of view in judicial practice have been expressed regarding the evidence of moral prejudice.

Thus, according to an opinion[21], "it is necessary to prove the existence and extent of moral damage, as well as the existence and extent of the damage, since the reasons of art. 272 The Labor Code regarding the fact that the burden of proof lies

---

[17] Alexandru Țiclea, Andrei Popescu, Marioara Țichindelean, Constantin Tufan, Ovidiu Ținca, *Dreptul muncii*, Rosetti, Bucharest, 2004, p. 600.

[18] Under the rules and principles of contractual civil liability, the employer is required to compensate the employee if he has suffered material or moral damages as a result of the employer's misconduct in the performance of his / her duties or in connection with the service.

[19] See Alexandru Țiclea, *Prejudiciul condiție a răspunderii pentru daune*, „Revista Română de Dreptul muncii" no. 4/2014, p. 23.

[20] See Ion Traian Ștefănescu, *op. cit.*, p. 484.

[21] See Civil Court of Mehedinți Court no. 174/2017, available online at the address published on https://lege5.ro/App/Document /ge3dinzzha4q/sentinta-civila-nr-174-2017-desfacerea-contractului-de-munca&relIsActive=False&relSectionType=2, viewed on 21.11.2017.

with the employer, no longer subsists in this situation, the burden of proof lies with the injured employee. Even if the dismissal measure proved to be unlawful, (...) the granting of moral damages is conditioned by the production of a minimum of evidence and indices of the existence of the employee's moral prejudice and the extent of the damage, and can not be presumed neither the existence nor the extent of the non-pecuniary damage suffered by him. "

To the contrary, the High Court of Cassation and Justice held in its case-law that "the existence of the illicit deed presupposes the existence of moral damages and the causal relationship between the act and the prejudice, the Romanian courts often deducting the moral damage from the mere existence of the illicit deed which is likely to cause such damage, the solution being determined by the subjective, internal moral damage, its direct test being virtually impossible. "[22]

Judicial practice[23] has also highlighted an intermediate view, arguing that in some situations, the issue of the sanctioning decision involves moral prejudice (for example, when the imputed facts are serious but unrealistic, thus calling into question the professional competencies of employee or moral probity, or when the sanction has another real reason that constitutes a serious violation of the law), in which case the burden of proof is on the employer according to art. 272 of the Labor Code. If there are no concrete facts in the sanctioning decision and the nullity of the decision intervenes for reasons related to the legal conditions regarding the form of the decision, there are no elements leading to the conclusion that the moral prejudice is implicit, so that the claimant has the burden of proof.

As far as we are concerned, we appreciate that, in the case of moral damage, it is certainly a difficult task for the court to assess a fair amount of compensation. Therefore a priori rules or generally valid criteria can not be established. However, we do not exclude the possibility for the court to declare the moral damage caused by the simple existence of the illicit deed, when such a solution is required, in relation to the concrete situation.

6. Conclusions

In conclusion, the lack of more detailed explanations by the legislator regarding the obligations of the employer in the event of annulment of the dismissal decision of the employee may be likely to create difficulties in the judicial practice.

Therefore, *de lege ferenda*, we believe that it would be welcome to complete the provisions of art. 80 of the Labor Code, in the sense of mentioning the employer's obligations to reintegrate the employee, ie the fulfillment by him / her of all the necessary steps in this regard (handing over of documents, goods, etc.) that make it possible for the employee to perform the work. Regarding the content of the phrase

[22] Decision of the High Court of Cassation and Justice no. 3806/2013, available online at http://www.scj.ro/1093/Detalii-jurisprudenta?customQuery%5B0%5D.Key=id&customQuery%5B0%5D.Value=106767, viewed on 21.11.2017.

[23] See Judgment of Constanta Court of Appeal no. 117/CM/2016 published in the "Romanian Journal of Labor Law" no. 8/2016, p. 119.

the other rights that the employee would have received, this includes, besides the salary and all bonuses related to him, regardless of their character (permanent or non-permanent)

Otherwise, there will still be controversies in practice due to the fact that the employer does not know exactly what steps to take to reintegrate the employee. Also, with regard to the financial entitlements due to the unlawfully dismissed employee, in the absence of detailed explanations, some employees will receive money in a different amount from the others depending on the interpretation of courts or employers.

Bibliography

Alexandru Țiclea, *Reintegrarea în muncă-urmare a anulării concedierii*, in „Revista Română de Dreptul muncii" no. 11/2016.

Alexandru Țiclea, Andrei Popescu, Marioara Țichindelean, Constantin Tufan, Ovidiu Ținca, *Dreptul muncii,* Rosetti, Bucharest, 2004.

Alexandru Țiclea, *Prejudiciul condiție a răspunderii pentru daune*, „Revista Română de Dreptul muncii" no. 4/2014.

Ion Traian Ștefănescu, *Tratat teoretic și practic de drept al muncii,* Ed. Universul Juridic, Bucharest, 2010.

Ion Traian Ștefănescu*, Codul muncii și legea dialogului social. Comentarii și explicații,* Universul Juridic, Bucharest, 2017.