THE ROLE OF THE ECONOMIC JUSTIFICATION IN THE COLLECTIVE DISMISSAL PROCEDURE

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Abstract

Given that any collective dismissal process must begin from a decision of the competent corporate body, the paper analyzes the reasons leading to the issuance of such a decision of reorganization, which is the justification for technical and economic viability of that decision and what It must include to be thorough and legal in the context of a possible legal claim before the courts. We studied the role of the efficient and complex analysis of the company in terms of organizational and / or economic reasons but also the impact that the change in the company's structure will have by reducing the positions for which the activity will be considered redundant through the same analysis. Research aimed the position and the implications such an economic analysis will have on the entire collective dismissal procedures, procedures that are very precisely controlled by state institutions empowered by the phases imposed by law but also in agreement with the employer`s social partner. In a state that encourages commercial freedom and the exclusive organizational privilege of the employer, may the court censor the effects of this procedure analyzing itself the opportunity of reducing positions targeted by the reorganization caused by economic reasons, or may issue considerations strictly in terms of reality and the seriousness of the causes that led to the adoption of such a decision of the employer?

Keywords: *dismissal; collective; economic justification; legal.*

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1. Introduction. Collective redundancies. Notion. Dismissal for reasons not related to the employee

Regarding the regulation of collective redundancy, it is not denied that the legal grounds in the Romanian law - Law 53/2003 Labour Code, republished - contain a definition which is aligned to the provisions of Directive 59/98/EC applicable in this matter. It is quite obvious that the provisions of Romanian law are true to the text of the Directive, namely art. 1, item 1, letter a) i). Also the last paragraph of art. 1 point 1 has been picked up, referring to the assimilation as layoffs of other termination of individual employment contracts by the employer without regard to individual employees,

Therefore, in accordance with art. 68 of the Labour Code, the collective dismissal means the dismissal, within a period of 30 calendar days, for one or more reasons not related to the employee, of a number of: a) at least 10 employees, if the employer who performed the dismissal has more than 20 employees and less than 100 employees; b) at least 10% of employees if the employer is dismissing at least 100 employees, but fewer than 300 employees; c) at least 30 employees if the employer has at least 300 employees.

The law and the directive distinguishes also that the employees taken into account and to whom individual employment contracts are terminated by the employer of one or more reasons not related to the employee, provided there are at least five redundancies.

Collective redundancies, usually aiming reasons of reorganization of the company, intervenes as a rule for reasons not related to the employee. These are individual employment termination due to abolition of the position held by the employee, for one or more reasons not related to his person, being governed by art. 65 para. (1) of the Labour Code, which is the only case covered by the Labor Code, when the termination of the individual employment contract by the employer is unrelated to the employee, respectively the abolition of the position held by him.

Case law leads to a natural question in addressing the concept of collective redundancy and its relation to dismissal for reasons not related to the employee. So we target the conformity of the definition of collective dismissal in the national law with the European spirit of the definition. In a

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case of the Court of Justice of the European Union[2], the court held that the notion of dismissal must be perceived and analyzed as "*including not only redundancies for structural reasons, technological or cyclical, but also any other termination of individual work which is not sought by the worker, and therefore without his consent*." According to the reasoning of the court, the termination of an employment contract without the consent of the employee can not exceed the scope of the Directive just because it depends on external circumstances not related to the employer's will.

The grounds for dismissal by the employer, not related to the employee are limited to economic reasons or structural reorganization. These grounds are confirmed by doctrine, even though no legal text specifies of such grounds and even though the old provisions of the collective labor agreement at national level that used to specify these economic reasons, are no longer in force.

For example, the dismissal of an employee for these reasons occurs when the employer considers that a job has become economically unprofitable. Unprofitability may cover either economic issues or simply to reorganize the company. In this regard, the reorganization looks and the relocation of the internal structure in order to improve the activity and may include any measure aimed at increasing the performance of the work. The doctrine points out that: "*Restructuring can be determined by one of the following: economic and financial difficulties; poor results in commercial distribution; optimize profits by reducing costs; diminishing turnover or market orders or exports; reducing profits, and therefore profitability*"[3]. The same author points out that, although it is not necessary that the employer should prove the existence of economic difficulties," *it is necessary for him to pursue the streamline of the activity in the purpose of using with maximum efficiency the human and financial resources, taking the measures they deem necessary to increase profits, provided that such measures are in conformity with the law*"[4].

To those analyzed in this paper, we mention that in the same sense ruled the ECJ, stating that "*the need for uniform application of Community law and the principle of equality requires that the terms of a provision of Community law which makes no express reference to the right of Member States must normally be given an autonomous and uniform interpretation throughout the Community to determine the meaning and scope which should take into account the context of the provision and the purpose of that legislation*"[5].

We would be wrong if we did not consider the broad sense of the provisions of the Directive. It's main purpose is "*to promote greater protection for workers in the event of collective redundancies, taking into account the need for sustainable economic and social development within the Community*" and more importantly, to ensure the equal treatment of employees in all Member States. Perhaps it would be justified to ensure safeguards for employees whose individual contract of employment is terminated in these cases, excluded by Romanian law from any category of redundancies, mainly in order to mitigate the negative consequences of termination of employment by resorting to social measures aiming, for example, support for the redeployment or retraining employees. The same situation is if the individual employment contract can not be executed in case of a major force event, which is missing in cases of termination regulated by the Romanian legislation, but could also warrant special protection measures, specific for dismissals. [6]

2. Legality *vs* opportunity in grounds of collective dismissal

The main problem in most disputes which come before the courts, litigation aiming contestations of decisions of dismissal for reasons not related to the employee, is the reason why the court is called to analyze the decision to dismiss. Through the active role of the court, is thus required

2 C 55/02, The Comission of the Europeann Comunities against The Republic of Portugalia.
[3] Alexandru Ţiclea, *Tratat de dreptul muncii. Legislaţie. Doctrină. Jurisprudenţă.,* Universul Juridic, Bucharest, 2013, p. 733.
[4] Idem, p. 734.
[5] C-188/03, Irmtraud Junk against Wolfgang Kühnel, point 29 and 30.
[6] Ion Traian Ştefănescu, Şerban Beligradeanu, *Înţelesul şi sfera de aplicare a noţiunilor de forţă majoră şi caz fortuit în dreptul muncii,* in Revista „Dreptul" no. 6/2008, p. 40.

an analysis of the redundancies by the lawfulness or by the appropriateness of the reorganization measure, respectively the dismissal?

Doctrine and case law decides that the court is required to verify the legality of issuing the dismissal decision, to ensure reconciliation of the decision with relevant and mandatory law. [7]

In this regard, by calling to justice the applicant disputes the legal enforcement by the employer in the decision to dismiss and in the actual pursuit of collective dismissal procedure. But what happens when the applicant seizes opportunity proceedings in matters of collective dismissal procedure, respectively, in the final act within it, the decision to dismiss. If indeed, in the light of the evidence in the case the judge noted that there is a problem of opportunity, of the utility of the legal issuer, will the judge refrain from determining the unlawful dismissal, precisely because it is not vested with this analysis by the applicant through the legal provisions? If, however, the judge would apply this interpretation, what will happen with the employer's freedom and his prerogative, which is eminently unique, in organizing his work?

In the case of collective redundancy, respectively a dismissal for reasons not related to the employee, the court is required to verify the employer's compliance with the requirements imposed by law in the procedure for collective redundancies and in his decision to dismiss the individual employee applicant. Therefore, the analysis will be required by the court to the legal requirements, including the existence of a real and serious cause, which stand on the base of the dismissal of the concerned employee.

Can the court censure the prerogative of an employer organization by analyzing the decision to dismiss or only its legality? We believe that as long as the court, in terms of material evidence and analysis of possible signs of bad faith from the employer, unless it finds an abuse of rights or breach in bad faith to the principles of business and employment relationships minimal, the choice of abolishing some jobs in its company organization chart only depend on determination of the employer, through the prerogative referred earlier.

3. Analysis of economic justification of the dismissal. Real and serious cause

In general, the economic justification must be viewed from two perspectives. The *macro* perspective covers all causes and market conditions that led to the need for the employer to adopt a plan of reorganization, of retraining (major or not) the plan of business, the efficiency in order to better management of work performed and/or cost rationalization. The causes that lead to such a need to change the internal structure of the staff are highly variable, with origins: economic (based on a budget of expenditure), technical (ie., continuous technological revolution), legal (ie, rules obliging employers to have a function in its structure with certain qualifications censored by the state) management strategy springing or not on the trend of business market profile (ie, adjusting management functions by targeting specific requirements/applied to the object activity of the organizational structure).

On the other hand, the micro perspective of economic justification, is in fact the reason that the dismissal of an employee based art. 65 of the Labour Code shall be made in consideration of the post and not the employee, and for rescinding a function, the employer should explain the objective reasons that led him to choose the post for demolition.

To thorough develop the economic justification, which will be the grounds for dismissal, the employer will have to justify not only as a general the abolition of posts, but the employer has an obligation to explain why only some items (eg, an economist) were abolished and the remainder retained. So the two meanings of the economic justification will need to be applied in cohesion to thoroughly substantiate why employers choose to keep an identical post with the abolished.

Of course, the identity of the positions will not be sought in the name/description, but in the content of the post, respectively in the set of tasks and responsibilities which the post has in the organizational structure of the employer. Since the duties of the post are set according to art. 40 para.

[7] DEX, pg. 722.

(1) b) of the Labour Code, by the employer, he will need to explain the notable difference between two identical posts by name, but not by content, if he chooses to dismantle one of these two positions. In other words, the employer is unable to substantiate the abolition of such a post on general grounds presented in the economic justification, but he will have to explicit (eg, by the content of duties theory) why that post will be abolished and the other identical one (even if part of another division of the employer) will be retained.

In employers practice, the need of dismantling a particular post is a consequence of downsizing activities, following the reorganization of the processes, but these must be based on reasons well established and easy to prove in a court of law, or on explanations about the kind of resized activity, the manner in which these activities / processes have been reorganized. For example: "*it has to be taken into account the report on the causes and circumstances that led to the emergence of insolvency and Background note of the measures taken in order to reorganize society including the creation of an organizational structure effective and nature to reduce costs. To implement the decision no. 46 / 01.16.2013 were imposed changes and / or abolition of posts, including canceling the caller station, these transformations and abolition of posts is determined by the order management needs for a more efficient organization of work [...] All this prove that the collapse of the workplace had a real and serious cause* "[8].

The importance of the economic justification envisages therefore a first final goal, respectively showing a real and especially a serious cause for the abolition of the position held by the applicant, proof of the existence of a causal link, between the reasons given and the removal of the post in the organizational chart of the employer.

In legal doctrine [9] and jurisprudence was shaped what is meant by the concept of real and serious cause. So that a cause is real and serious, it needs to meet the following conditions:

1. have an objective character, namely under the Labor Code, to be imposed for one or more reasons not related to the employee; therefore, the case must be independent of subjective factors of any humor or caprice of the employer.

2. be precise (exact), to be the true reason for the dismissal, i.e., not conceal other grounds (such as intention to fire at any price a specific employee), arguing formally that there was one or more reasons not related to the employee.

3. be serious, in the sense that reasons unrelated to the employee to have a certain level of importance that require the reduction of a job. It requires such a report to be proportionally between cause and effect.

For example, closing a particular post may be imposed by the need for reorganization determined by the policy of efficiency and cost reduction throughout the Company in the context of economic difficulties in which the employer at the time of issuing the dismissal decision. So this state of financial difficulty has led to the need for measures to the streamline and reconsideration of the activity, drastically reducing spending in order to optimize the company. Also, in exact terms, the cause which led to the abolition of the job is in great majority of cases the reorganization of society on the basis of efficient and economically criteria, and particularly in serious terms, reasons for abolishing the post may include financial loss, improper management of the activity that led to the general reorganization. The courts confirmed this: "*These grounds for dismissal can be so exposed by ample reasons or summary with details in economic data, statistical, financial, etc. or without such breakdowns with reference to fill the concrete situation which disbanded or character references generality about the situation of the entire organization, but also applicable to the specific case.* "[10].

An important question is the thesis that mentioning the reasons for the dismissal, respectively exemplifying the nature and basis of the grounds, are not the same as proving them, so that the legal representative of the company that has taken this measure must satisfy the claims of justification or probation that applicant would phrase or even by the court in exercising its control, although the law does not provide. Therefore, art. 76 and art. 65 of the Labour Code do not talk about the need of

[8] Civil Decision nr. 1232/19.09.2014 ruled by the Bucharest Court of Appeal in file no. 31699/3/2013, p. 47.
[9] I.T. Stefanescu, *Tratat teoretic si practic de drept al muncii*, 3rd edition, Universul Juridic, Bucharest, 2014, p. 448-450.
[10] Civil Decision no. 1182/17.09.2014 ruled by the Bucharest Court of Appeal in file no. 29399/3/2013, p. 36.

motivation the abolishing of each post in the targeted reorganization, related to cost and deliverables exempt, because this is a matter of evolution in time. The first (art. 76 of the Labour Code) refers to cause of the contract termination, due to sufficient exemplification of abolishing the job due to restructuring and the second (art. 65 of the Labour Code) claims that the cause should be actual real and serious. In other words, it is required that the post will be suppressed effectively in the structure of society, and the affirmed reason of the imperative of resizing the organizational chart is to be proven, through the studies and reports which led to the decision.

An important role in this discussion represents the argument of the exclusive attribute of the employer to organize his work and his activity. So, the vast majority of specialized doctrine affirms that the employee or the court can not be able to deliver considerations about the appropriateness of the reorganization. We tend to agree with this interpretation, but not carried to a rank of an axiom. Thus, the exclusivity attribute of the employer to organize the work should not be brought to the rank of an axiom, meaning recognition of a discretionary right of the employer to abolish posts and therefore to lay off staff, but reasoned/justified by some reason real and serious causes that provide a foundation for such an endeavor. So states the practice of courts in Romania: "*In principle, in general, the law does not censor the right of bodies which manifest the will of the company to choose which posts (compartments, structures) abolishes, and why others kept, the less the court does not have to intervene to decide in their place, defeating constitutional powers, as in appreciation compared to the financial results, it requires keeping the old constitution. The employer holds investment and dispose of it, being sovereign in determining areas of activity and the staffing, direction in which it recognizes a wide margin of appreciation of the means and measures that will ensure the realization of the new vision of management, even some who not appear immediately as useful to society, on condition of not being fictitious. Especially when legally declared insolvent it is, by hypothesis, a proof of financial difficulties and legal cause for dismissal.* [11] "

We believe that in the analysis of real and serious cause of the abolition of the post, the court should not be confined to verify if there was actually a reason - economic, technical, structural model for the implementation of this drastic decision, but whether the employer in this case was imposed abolition of that post just in case uniqueness of the station in the structure of their employer or the employee dismissal - in the dismissal case when the application of selection criteria for multiple stations in the same way structure, occupied by employees. Also, the doctrine considers that the court should examine whether the maintenance station in the structure of society would have unwanted consequences in terms of financial or activity more efficient for the employer or simply to keep the job would have been unnecessary in light of the lack of activity specific to it. For example, the courts considered that: "*As for the actual serious cause of dismissal [...] in the dismissal decision, closing the station is motivated by the need for reorganization of business, being invoked decision no. 46 / 01.16.2013 of the receiver approving a new organizational structures [...] based on the reorganization of state special situation in which the company was [...] aspect that warrants urgent action, including derogations from general and special rules adopted for the protection of employees.* [12] "

When we speak of the seriousness of the case for which the position is abolished, it is clear that the reasons leading to this aspect must target of obvious character, serious and unavoidable, through other way besides taken so far. Also, we mention the consequences of missing a reorganization or maintaining jobs whose work is redundant, or for which costs are exponentially high compared to the financial results produced by their activity.

Likewise is the practice of judicial courts in this case, regarding situations that range from lack of criteria for reorganization of the company in technical and economic justification, namely: orientation processes of the organization; branches dividing by the number of employees in branches of large, medium and small; territorial dispersion; outsourcing, merging, closing certain activities; resizing of activities due to the processes of their organization etc. Most times it is considered

[11] Civil Decision no. 555/14.04.2014 ruled by the Bucharest Court of Appeal in file no. 29376/3/2013, p. 46.
[12] Civil Decision no. 1173/17.09.2014 ruled by the Bucharest Court of Appeal in file no. 10033/3/2013, p. 48.

imperative to specify in the reorganization decision based on technical-economic justification, the analysis of structures affected by the reorganization measure, resizing number of staff being made only on the basis of reorganization approved by that decision.

Also, in many cases the employer includes in the motivation of the dismissal measure, even analysis of layoffs on every business activity, followed by abolishing of activities such as removal of archaic crafts following the analysis of the classification of positions and trades in force, reorganization of the internal and external communication activities between branches of society by abolishing the related maintenance and dismissal of employees exercising powers of communication, development and refurbishment business reorganization, etc.

4. Conclusions

We conclude so by specifying that any reorganization measure resulted in the collective dismissal (motivated by causes that are not related to the employee) must start with a detailed justification, a comprehensive and relevant on to the reasons for the reorganization of the society and for the measures that need to be taken and how these measures will be exercised. Therefore, we believe that analyzing the doctrine and case law, we have shown clearly that any such measure must be based as clearly and efficiently through such reasoning.

It has to be taken into consideration that the court is required to consider the legality, and not the opportunity measure of dismissal based on reorganization, but we found that when it comes to a abuse of rights by their employer or measures taken in order to disrespecting the laws, the courts can seize and censor these approaches, noting that the measure ordered against the employee is an illegal one.

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