Observations relating to compensations in the case of admission to the complaint against of the dismissal decision

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Abstract

The study aims to analyze a consequence of the annulment of the dismissal decision by the court, for reasons of lackluster or unlawfulness. According to art. 80 of the Labor Code, in the event of the finding of illegality and/or inadequacy of the dismissal decision, the court orders the cancellation of the unilateral act of dismissal. An effect of the annulment of the dismissal decision is the employer's obligation - in all cases - to compensate the employee equal to the indexed, increased and updated salaries and the other rights that the employee would have been entitled to if he had not been dismissed. In relation to the imperative wording of the legal text, atypical assumptions are considered in which the award of damages should be nuanced in relation to the factual situation that led to the termination of employment relations. There are also issues related to the content of the claims and their amount.

Keywords: employee, employer, dismissal, compensation.

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1. Introductory considerations

Art. 80 of the Labor Code provides: "(1) If the dismissal was carried out in a non-traditional or unlawful manner, the court shall order its annulment and shall oblige the employer to pay equal compensation with the indexed, increased and updated salaries and with the other rights that the employee would have received. (2) 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. (3) If the employee does not request reinstatement in the situation prior to the issue of the dismissal act, the individual labor contract shall cease to have effect on the date of the final and irrevocable stay of the judgment".

If, after notification of the dismissal decision, a lack of mandatory condition for the validity of the decision is found, the parties may find that the decision is null and void and may determine the effects of the decision by agreement. On the contrary, if the parties do not reach an agreement and the former employee considers that the dismissal decision was issued in a non-motivational manner, or was not motivated or the reasons invoked are not real or illegal, the legal rules on the dismissal procedure, the form or the content of the decision, it may lodge an appeal against the decision, bringing the matter before the competent court. According to

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art. 78 of the Code, the dismissal ordered in violation of the procedure provided by the law is punished by absolute nullity.

From the wording of art. 80 par. (1) that, in the event of a finding of irrelevance and/or unlawfulness of the dismissal decision, the court has the obligation to order the annulment of the act and, cumulatively, to oblige the employer to pay equal compensation with indexed, increased and updated salaries and with the other rights that the employee would have received. Regarding the imperative way of formulating this legal text in the present study, we will make some remarks regarding the granting of the indemnities, their character and their amount.

2. Compensation

Compensation appears to be an effect of the annulment of the dismissal decision.

The legal provision is an imperative rather than a suppressive one, which does not allow the employer or the court to judge the desirability of awarding the indemnities according to the concrete situation in which the dismissal was made. Thus, damages are granted ex officio, irrespective of whether or not the complainant complainant has made a separate claim in the appeal. Therefore, the court does not have the duty to administer a piece of evidence from the point of view of determining the right to compensation or the amount that would be due to the applicant in the event of annulment of the dismissal decision. In other words, the analysis of the claimant's right to redress exceeds judicial control and is irrelevant to the effects of the cancellation of the dismissal measure. The right to compensation is a measure of protection lawfully imposed on the dismissed employee as an absolute right in case of unlawful or non-industrial dismissal, to which he can not give up, according to the provisions of art. 38 of the Labor Code[2].

In the literature[3], it is also argued that although the Labor Code expressly refers to damages, in reality the employer's obligation is a reimbursement clause that takes effect as a result of the nullity of the employer's unilateral act. This interpretation results from the corroboration of art. 1325 with art. 1254 par. (3) of the Civil Code. According to that interpretation, the applicant is not required to prove the existence and extent of the damage.

In another interpretation it is argued that the legal text establishes a legal assessment of the extent of the damage caused to the employee as a result of the unilateral measure taken by the employer, a measure judicially appreciated, as unlawful or ungrounded.

[2] A. Țiclea, *Tratat de dreptul muncii. Legislație. Doctrină. Jurisprudență,* the eighth edition, revised and added, Universul Juridic Publishing House, Bucharest, 2014, p. 789.

[3] F. Roșioru, *Dreptul individual al muncii. Curs universitar,* Universul Juridic Publishing House, Bucharest, 2017, p. 630.

Both the legal doctrine[4], and the judicial practice are unanimous in assessing that the employer's obligation to pay damages operates *ex officio* and is legally limited to the amount of indexed, increased and recalculated wages and other entitlements to which the employee would have been entitled from the date of communication of the decision dismissal and until the date of delivery of the judgment, the final remaining of the court decision or the effective reintegration of the employee, depending on the way in which the appeal is filed.

Beyond the fairness of these main theses, in the practice of labor relations we find certain atypical situations. Thus, the question arises: In certain specific assumptions, the court should not be able to assess the amount of damages in the light of the principle of good faith in labor relations? In fact:

- the employee, who is part of an individual contract of indefinite duration, makes a written notice informing the employer of termination of the individual labor contract by resignation, according to art. 81 of the Labor Code. The employee, without being in a situation allowing him to resign without notice (according to art. 81 paragraph (7) and (8) of the Labor Code], does not understand to comply with the notice period and, consequently, the employer has disciplinary dismissal based on unjustified absences. Later, the dismissed employee disputes the decision to dismiss (disciplinary dismissal) and seeks compensation under art. 80 par. (1) of the Code.
- the employee, who is part of an individual fixed-term employment contract, contests the dismissal decision and seeks compensation under art. 80 par. (1) of the Code, but the individual employment contract was terminated by law at the end of the period for which it was concluded [according to art. 56 para. (1) letter i) of the Labor Code], respectively, prior to the date of the decision to annul the dismissal decision.

These situations actually lead us to have a circumstantial approach to the amount of damages granted in the event of annulment of the dismissal decision.

In both situations, it is undisputed that the contestant complainant has not presented himself at the workplace to carry out his work. Also, the deadline for notice or expiry of individual employment contract concluded for a fixed results in termination of the individual employment contract and the effects of extending individual labor contract can not be more extensive than those resulting typically in execution contract. In this respect, it is necessary to mention art. 159 of the Labor Code which defines the salary as the consideration of the work done by the employee on the basis of the individual labor contract. However, the lack of employment by the employee does not impose an obligation on the employer to pay salary correlation

[4] M. Gheorghe, *Comentariu la art. 80* in I.T. Ștefănescu, (coord.), *Codul muncii și Legea dialogului social. Comentarii și explicații*, Universul Juridic Publishing House, Bucharest, 2017, p. 175; I.T. Ștefănescu, *Tratat teoretic și practic de drept al muncii,* fourth edition, revised and added, Universul Juridic Publishing House, Bucharest, 2017, p. 530; B. Vartolomei, *Dreptul muncii. Curs universitar,* Univerul Juridic Publishing House, Bucharest, 2016, p. 177; A. Țiclea, *op. cit. (Tratat de dreptul muncii. Legislație. Doctrină. Jurisprudență),* 2014, p. 790; L. Dima, *Comentariu art. 78,* in Al. Athanasiu, M. Volonciu, L. Dima, O. Cazan, *Codul muncii. Comentariu pe articole. Vol. I. Articolelel 1-107*, C.H.Beck Publishing House, Bucharest, 2007, p. 413.

rights. Thus, it can be argued that the unreasonable obligation is, as a result, lacking legal protection.

This argument can be relied on by the counter-argument that, under art. 80 par. (1) of the Labor Code, order the employer to pay damages is ground tort liability and not on the contract and, more employee - appellant could not renounce a right stipulated in his favor, according to art. 38 of the Labor Code.

Beyond these arguments and counter-arguments, the legal text provides for a single hypothesis to require the employer to compensate for the unilateral measure of dismissal of the employee for non-traditional or unreasonable reasons. The employer must compensate the employee by paying an amount equal to the indexed, increased and updated wages and the other entitlements he would have enjoyed, ie, if the employer would not have dismissed him.

Or, to formulate legal text ("rights that would benefit"), in the first case, the non-provision of work during the notice period was not caused by the employer's decision, but unilateral voluntary act of the employee to resign. Considering the provisions of art. 80 par. (1) of the Labor Code a realization of the consequences of nullity of dismissal unlawful or unreasonable, requiring reinstatement parts of the state before the act unilaterally illegal employer, annul the decision of dismissal and compensation for damages equal to the wage can not be justified on these grounds since the decision the employer was after the unilateral manifestation of the employee's will. Otherwise, the claimant would have patrimonial rights without a legal cause.

In the second hypothesis, damages should be granted until the date on which the individual fixed-term employment contract was due to expire.

3. The amount of damages

As regards the amount, the specialized doctrine[5] and the judicial practice, it is acknowledged that the compensation due in these situations to the employee must be calculated in relation to the salary he would have had if he had not been dismissed, ie the employee benefits from the increases and indexations intervened in the meantime, by law or by the applicable collective labor contract. The redundant employee shall, where appropriate, enjoy the equivalent of rights in kind. There are no money entitlements that require the employee to perform the activity effectively (such as working conditions bonuses, nighttime bonuses, meal vouchers). Compensation is also due if the employee, after the date of dismissal, has been assigned to another employer.

Such compensation is granted for the period between the date of dismissal and the date of the judgment or the date of effective reintegration, depending on how the complaint was filed. If the contestant did not specify the period, the court grants them until the date of the judgment (in substance).

[5] See I.T. Ștefănescu, *op. cit. (Tratat teoretic și practic de drept al muncii)*, 2017, p. 530; L. Dima, *Comentariu art. 78,* in Al. Athanasiu, M. Volonciu, L. Dima, O. Cazan , *op. cit. (Codul muncii. Comentariu pe articole. Vol. I. Articolelel 1-107)*, 2007, p. 413.

4. Granting of moral damages in case of dismissal of the employee

Another issue that has been raised before the courts is the extent to which the award of damages, under art. 80 of the Labor Code represents a sufficient and fair reparation to cover the moral prejudice suffered by the employee as a result of the dismissal found to have been unlawful or ungrounded.

From the analysis of the judicial practice on this point, it is clear that the courts have prudence in assessing the granting of moral damages in the case of dismissal of the employee. Thus, there is a diverse practice, with solutions being made:

- to the effect that the annulment of the dismissal measure ordered by the employer on grounds of illegality or inappropriateness, together with the reintegration of the employee into the previously occupied workplace (if requested) and the payment of the compensatory damages (provided for in article 80) is sufficient coverage of the damage (both material and moral) caused by the unilateral measure of the employer[6];
- in the sense that the compensation granted pursuant to art. 80 does not cover the moral prejudice suffered by the employee and, as such, the existence of such damage must be proved[7].

[6] Iaşi Court of Appeal, Labor and Social Security Litigation, Decision no. 184 from 17.02.2010: "In the present case, the Court of First Instance held that no proof of the moral prejudice suffered was proved; having regard to the moral reparation, the award of moral damages must be based on a proven causal link between the damage claimed by the employee and the employer's deed, which is likely to produce the alleged harm; In this situation, the burden of proof belongs to the injured employee, namely the applicant in this case. Thus, the contestant did not prove the existence and extent of moral damage, the existence and extent of the damage, and not enough support in the sense of damaging honor and dignity by the measure taken by the employer, even if this measure proved to be illegal. Moreover, by re-integrating it and paying all the rights it would have received, it covered the potential damage (this was reinstated in the previous situation)"; Bucharest Court of Appeal, Section VII Labor and Social Insurance Conflicts, Decision no. 1611A of 30.03.2016 and Decision no. 541R of 30.01.2013, published in volume L. Uță, *Daunele morale în contencios administrative, în litigii cu profesioniști, de muncă și de asigurări sociale. Practică judiciară*, Hamangiu Publishing House, Bucharest, 2017, pp. 176-183, pp. 232-238; Timișoara Court of Appeal, Labor and Social Security Litigation Division, civil decision no. 1488/A of 5 November 2015, unpublished.

[7] Thus, moral damages were granted in assumptions: where it was proved that there were pressures of the employer to terminate the individual labor contract, when the employer issued (successive) dismissal decisions concerning the same employee, which caused a state of frustration of the employee generated by the way the employer acted and the economic instability of the employee; when after a decision to reintegrate as a result of the finding of the unlawfulness of a dismissal decision, the employer issues a new decision of unlawful dismissal which has created a frustration as a result of the way in which he acted, the dissolution of the illusions about the continuation of the employment relationship with it and earning the necessary income for living, in the context of the difficult economic situation at the general level, impacting the labor market and hindering the process of getting a job. See the Bucharest Court of Appeal, Section VII, Labor and Social Security Conflicts, Decision no. 1471 of 05.05.2015, published in volume L.Uță, *op. cit. (Daunele morale în contencios administrative, în litigii cu profesioniști, de muncă și de asigurări sociale. Practică judiciară),* pp. 169-176; See the Bucharest Court of Appeal, Section VII, Labor and Social Security Conflicts, Decision no. 1471 din 05.05.2015 in L.Uță, *op. cit.*, p. 169-176; Court of Appeal Timișoara, decision no. 1090 of 10 July 2017.

5. Conclusions

An essential issue in our opinion is the correct understanding of art. 80 par. (1) of the Code in the light of the nature of the damage to which it relates. It follows from the legal wording that compensation is intended to cover material damage, but this text must be correlated with art. 253 par. (1) of the Code which also expressly refers to the repair of moral damages by the employer. The concluding conclusion is certain: the corroboration of the two texts presupposes the always granting of material damages, as well as of the moral damages to the employee who was unlawfully dismissed or not, obviously, if requested and proved. We do not agree with the principle retention of some courts that the employer's obligation to pay material damages, as a result of the annulment of the dismissal decision, according to art. 80 of the Code, as well as the reintegration into the post held prior to the dismissal (in the situation in which the plaintiff has requested expressly) constitutes a sufficient and equitable reparation and would also cover moral damages since the award of damages [under art. 253 par. (1) of the Code] is made for the consequences produced in distinct plans, namely material damages (equal to the indexed, increased and updated wages and the other rights that the person concerned would have been entitled to if he had not been dismissed) is granted as a result of lack of employment and corresponding salary due to the unilateral measure issued illegally or not, while the moral damages intervene to cover the moral suffering suffered by the employee to make that decision[8]. In the doctrine, it was appreciated that art. 80 par. (1) is not to be interpreted restrictively, in the sense that compensation is only material and limited to damage caused by non-performance of the employment contract, but may also be moral[9]. Also, the proposal was formulated as art. 80 par. (1) to supplement the moral and moral damages, not just material damage[10].

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