THE PHYSICAL AND/OR PSYCHIC INABILITY DISMISALL OF THE EMPLOYEE IN ROMANIAN LABOUR LAW

PhD student **Olimpia-Monica MATIAŞ**[1]

Abstract

On the historical and legal side, the physical and/or psychic inability of the employee to provide the corresponding post in which he was employed as a basis for the contract of employment that equated professional discordance (article 130 paragraph 1 letter e of the Labor Code of 1973, adopted by law No. 10 of 25 November 1972). Dismissal for medical reasons is one of the cases of termination of the individual contract of work from the employer, which excludes the employee's contributory negligence. The employee is unable to fulfill his/her service obligations due to the reduction of some of his/her biological, intellectual capacity. The physical condition and/or mental inability of an employee in the performance of the duties corresponding to a post service is not general, but specific workplace at the time. Owing to the nature of the objective medical lies, we appreciate the useful proposal de lege ferenda, that where the employer opts for the dismissal of the employee pursuant to art. 61(c) the Labor Code, due to the fact that at the same time there is no vacancy in the unit, to opt for the cessation of the individual employment contract.

Keywords: *dismissal, physical inability, psychic inability, employee*

JEL Classification: *K31*

1. Definition and History

On the historical and legal side, the employee physical and / or mental inability to perform the work for which he/she has been assigned is a ground for the cancellation of the employment contract assimilated to that for professional unfitness the physical and/or psychic inability of the employee to provide the corresponding post in which he was employed as a basis for the contract of employment that equated professional discordance (article 130 paragraph 1 letter e of the Labour Code of 1973, adopted by law No. 10 of 25 November 1972[2]).

The Labour Code in 2003[3] has expressly established the employee dismissal institution for medical reasons.

According to art. 61 letter c. of the Labor Code, the employer may order dismissal "when, by decision of the competent expert medical report bodies, a physical and /or a mental inability of the employee is assessed, preventing him/her from fulfilling the duties corresponding to the position owned".

Dismissal for medical reasons is one of the cases of termination of the individual employment contract by the employer, which excludes the employee's fault.

The employee fails to fulfill service obligations due to the reduction of some of his/her biological, intellectual capabilities.

The following cases show examples of physical and / or mental inability of the employee[4]:

- Reduced acuity of one or more senses, namely those which the employee uses for his/her work;
- Loss of skill for professions where this capacity is required;
- Disturbances of reflexes for the persons who perform quick and accurate interventions (drivers, pilots, traffic controllers, etc.).
- Memory loss;

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[1] Olimpia-Monica Matiaș - Institute for Doctoral Studies, Law Department, Bucharest Univversity of Economic Studies, Judge at Timis Court, Romania, olimpia_matias@yahoo.com

[2] Published in the Official Gazette no. 140 of 01.12.1972.

[3] Law no. 53/2003, as it was published in the Official Gazette of Romania, Part I, no. 345 of 18 May 2011.

[4] See Raluca Dimitriu, Reflections on the employee dismissal for physical and/or mental incapacity, in the „Romanian Labour Code Magazine" no. 4/2004, p. 38.

- Psychiatric conditions that lead to loss of concentration, of resilience to stress if the work requires calm and self-control (PR, teachers);
- Various other physical disorders (stiffness of the arm, hernia, etc.).
- Slowing of the manual works, consequently being in the impossibility of meeting deadlines;
- Diseases (eg. Dermatological diseases) that can not be treated properly and in due time, for employees in catering or hairdressing, cosmetics, etc.

The term of physical and / or mental inability excludes:

- employee's disability, first and second grade, in which case the employee has lost all his/her work capacity, his/her individual employment contract ceases by his/her retirement;
- third grade invalidity, in which case the employee has partially lost his/her ability to work, his/her individual contract of employment may be terminated by disability retirement, however, his/her quality of employee is cumulated with that of the retired person;
- the temporary incapacity of the employee, in which case the employment contract of the employee is suspended according to Art. 50 letter b) of the Labor Code.

Therefore, to those facts, the physical and/or mental inability of an employee in the performance of the duties that correspond to a post is not general, but specific to a particular job held at the time.

2. Finding the employee physical and / or mental inability

Since art. 61 letter. c of Labour Code aimed at the employee inability to perform the specific tasks of a position, it is clear that the employee is not unable as a general rule, medically speaking, situation that would lead to his/her first or second degree disability retirement. "In conclusion, art. 61 letter c. is, in fact, a case of professional inability for medical reasons"[5].

2.1 Physical and / or mental inability when the individual labor contract is concluded

Even from the very beginning, it is necessary to make the following distinctions:

If the employee does not perform the mandatory employment medical examination, according to art. 27 of the Labour Code, the absolute nullity of the individual labor contract concluded under such terms occurs, mandated by art. 27 paragraph 2 Labour Code and the sanction of dismissal for physical and / or mental inability can not be ordered according to art. 61 letter c. Labour Code.

But if the mandatory employment medical examination has been performed and the employee is physically and / or mentally unable to perform the tasks of a specific job, and yet, the employer does not take this into account, using the employee in the execution of the activities for which he/she has been declared unable, the employer is charger with a pretty offence under art. 52 letters. a and b in the Government Resolution No. 857/2011 on establishing and sanctioning the violations of the public health rules[6].

Thus, under this article, the following shall constitute contraventions and shall be punishable by a fine from 1.000 to 5.000 lei for natural persons, or by a fine from 5.000 to 10.000 lei for legal persons the following facts:

a) failure by employers in every industry, public and private, to provide both medical examinations by occupational physicians, on employment, on return to work, when the workplace is changed and periodic medical examinations of the employees, according to the regulations in effect on health surveillance and occupational exposure of all the employees by occupational health services;

b) keeping a person in a position for which the health authorities have established a temporary or permanent medical contraindication according to the instructions of the Ministry of Health.

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[5] See Ion Traian Ştefănescu, *Tratat teoretic şi practic de drept al muncii,* second edition, revised and enlarged, Universul Juridic Publishing House, Bucharest, p.413.

[6] Published in Official Gazette of Romania no. 621 of 1 September 2011.

2.2. Physical and / or mental inability while the individual labor contract is executed

The provisions of art. 61 letter c. of the Labour Code are clear, referring to physical and / or mental inability of the employee occurred during the execution of the individual employment contract.

Medical ability or inability shall be determined by the decision of the competent expert medical report bodies, a physical and /or a mental inability of the employee is assessed, not allowing him/her to fulfill the duties corresponding to the position owned.

We are talking about a particular medical inability, so punctual, reported at the employee's workplace that must persist for a certain period so as to justify the assumption of medical inability to fulfil the tasks of the job owned by the employee, otherwise, only the sick leave problem arises.

From another point of view, the special medical inability must have a total character, otherwise, if partial, only the problem of the third degree disability retirement arises, in which case the person can still work part-time.

Instead, it is about the employee whose biological ability has been reduced in one respect or another and the position held is such that it affects the job performance.

We show, by way of example, some such circumstances:

- Reduced acuity of one or more senses, namely those which the employee uses for his/her work;
- Loss of skill for professions where this capacity is required;
- Memory loss;
- Different physical health conditions.

"When the employer takes the measure to terminate the labor contract because of the employee's biological ability reduction, we believe that the employer must consider the following issues:

a) is the condition that led to the biological inability reduction a temporary condition that can be treated medically or is it permanent?

b) the nature of the position held by the employee - whether the employee was using reduced or lost physical or intellectual ability when performing his/her work?

c) the cause of the disease which led to the employee's biological ability reduction - it's about the work process external causes (eg, age) or the conditions under which the work is performed;

d) the performance obtained in the new conditions;

e) any risks that would be involved if the employee continues working"[7].

2.3. Dismissal procedure for medical reasons for physical and / or mental inability

The Labor Code does not govern, for this case of dismissal, a certain prior research / evaluation procedure as long as the employee's physical and / or mental inability shall be determined by decision of the competent medical expertise.

If, after the decision by the competent medical expertise, it was found that the employee is physically and / or mentally unable to perform the tasks for the position he/she owns, also compared to the job description, the employer is the one who decides on his/her dismissal under Art. 61 letter. c Labour Code; the employer is not liable for anything is this case.

Therefore, the necessary condition for a grounded dismissal based on art. 61 letter. c Labour Code implies the existence of a prior medical decisions issued by the competent medical expertise.

Thus, according to Article 5.1 of the Government Decision no. 355/2007 on the employees' health surveillance[8], the employer shall be in possession of a risk assessment on his/her employees' health. Employers in every field of activity, both public sector and private sector must, comply with the regulations in force on the employees' health surveillance (art. 6).

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[7] See Raluca Dimitriu, *Concedierea salariaţilor,* Omnia UNI – S.A.S.T. Publishing House, Braşov, 1999, p. 185.

[8] Published in the Official Gazette of Romania no. 332 of 17 May 2007, as amended by the Government Resolutions no. 37/2008, no. 1169/2011 and no. 1/2012.

For the purposes of this resolution, the work ability is the medical ability of an employee to perform his/her work for the job / position for which the medical examination is required. To establish the work ability, the occupational physician may request other specialized investigations and medical examinations, in addition to those provided in art. 8 (art. 9).

Since the occupational physician makes medical recommendations, the ability is subject to their compliance, the medical notice on the medical fitness for work certificate will be "having limited capacity for work" (art. 10).

The temporary inability to work, for the purpose of this resolution, is the employee's medical inability to perform his/her work for the job / position for which the medical examination is required, until his/her health status is reassessed by the occupational physician. If the employee is in temporary inability to work because of an illness, and he/she can not perform his/her work for the job / position for which the medical examination is required from the occupational medicine, the occupational physician establishes the temporary inability until the medical cause disappears and the medical notice on the medical fitness for work certificate – appendix no.5 - will be "having limited capacity for work" (art. 11).

The permanent inability to work, for the purpose of this resolution, is the employee's permanent medical inability to perform his/her work for the job / position for which the medical examination is required for fitness to work (art. 12).

The medical periodic examination has the following purposes:

a) to confirm or to refute the periods of time for the work ability for the job / position and workplace for which the labour contract has been signed and the medical fitness for work certificate has been issued ;

b) to detect the occurrence of diseases that are contraindications for work and jobs with exposure to occupational risk factors ;

c) to diagnose the occupational diseases;

d) to diagnose the diseases specific for a certain profession;

e) to detect the diseases which are a life and health risk to other employees in the same workplace;

f) to detect diseases which are risky for the unit safety, for the product quality and for the population with which the employee comes into contact by the nature of his/her activity.

Periodic medical examination includes the following :

a) registration of the medical events that have occurred within the medical exam for employment or since the last periodic medical examination until the current medical examination ;

b) general clinical examination, according to the medical records provided in Appendix no. 4;

c) clinical and laboratory examinations, according to both the model form provided in Appendix no. 1 and to the examination indicated by the occupational health physician ;

d) recording the results in the medical records provided in Appendix no. 4 ;

e) conclusions by filling in the medical fitness for work certificate, according to the form provided in Appendix no. 5, by the occupational health physician , in two copies, one for the employer and the other for the employee;

f) upon recommendation of the occupational physician to determine medical incompatibilities with the assessed occupational risks, the periodic medical examination may include investigations and / or additional medical examinations as provided in Appendix no. 1.

The examined person may contest the result given by the occupational medicine physician for work ability. The appeal referred to in art. 30 is submitted to the County Department of Public Health or to that of Bucharest, within 7 working days of receipt of the medical fitness for work certificate.

The County Department of Public Health or that of Bucharest or designates a panel of three occupational medicine specialists and calls the concerned parties within 21 working days of receipt of the appeal.

The commission decision is recorded in the minutes and is communicated in writing to the person who has been submitted to the medical examination.

The minutes' conclusion is recorded in the medical fitness for work certificate where the result of the contested medical examination result has been recorded.

If the employer is in possession of such a medical resolution and chooses to dismiss his/her employee pursuant to art. 61 letter c Labour Cod, this resolution is issued in writing and under penalty of nullity, must be grounded in matters of fact and law and must include details about the timeframe in which it can be appealed and the court to which it can be appealed (Art. 62 para. 3 Labour Code).

However, in the case of dismissal, the employer shall propose the employee's other vacant positions in the unit, consistent with the employee's education/training or, where appropriate, with the work ability determined by the occupational physician. If the employer does not have any vacant position, according to paragraph 1, he/she is required to seek local employment agency support in order to redistribute the employee, according to his/her education/ training and / or, where appropriate, to his/her work ability established by the occupational physician.

The employee shall have a period of 3 working days from the notification of the employer, according to paragraph 1, to show his/her written consent for the new provided job/position.

If the employee does not manifest his/her consent within the period specified in paragraph 3 and after the case is communicated to the local employment agency under par. 2, the employer may dismiss the employee.

In case of dismissal for the reason referred to in art. 61 letter c., the employee receives a compensation, as provided in the applicable collective agreement or individual employment contract, as the case may be (Article 64 of the Labour Code).

As an exception from art. 61 letter c. of the Labour Code, there are special legal texts requiring the employer to provide another job for the person dismissed for medical reasons, for example, art. 23 para. 3 of Law no. 95/2008 on the State civil aviation aeronautical personnel in Romania, which provides that "if the technical staff is not medically fit to perform activities of civil aviation for which he/she is certified, the employer will provide another job that corresponds to his/her education/training, preserving the salary rights".

According to art. 75 para. 1 and 3 of the Labour Code, people dismissed pursuant to art. 61 letter c. have the right to a notice that can not be less than 20 working days.

If the individual employment contract is suspended during the notice period, the notice period shall be suspended accordingly.

2.4. Settlement of disputes

The material competence to resolve claims challenging the decision to terminate the individual employment contract based on art. 61 letter c. of the Labour Code belongs to the "courts able to hear claims concerning the settlement of individual labor disputes, courts established by law" (Article 209 of Law no. 62/2011 on social dialogue).

In this case, the first instance competence belongs to the tribunal, the appeals are resolved by the court of appeal, as the body of appeal.

It is also worth mentioning the aspect according to which the panel to solve the first instance causes on the labor disputes and social security shall consist of one judge and two judicial assistants (Article III, section 8 of Law no. 202/2010 on certain measures to accelerate the settlement process).

The territorial jurisdiction to resolve such requests belongs to the competent court in whose jurisdiction the applicant is domiciled or resident or, where appropriate, where he/she is located (art. 269 par. 2 of the Labour Code).

This type of application is exempt from judicial tax under art. 270 corroborated with art. 266 of the Labour Code

2.5. Judicial practice

2.5.1. The binding nature of the medical examination for determining the mental inability. The physical and/or mental inability can not be assessed by the employer. Generic assessment of the employee work ability, absolutely, not in concreto, with reference to the owned position

1. According to art. 61 letter c) of the Labour Code, the employer may order dismissal where, by decision of the competent organs of medical expertise, there is a physical and / or mental inability of the employee, which does not allow him/her to perform tasks appropriate to the position held.
2. The inability must be determined by the competent medical expertise by decision or, in this case, the claimant employee has not been subjected to such expertise, the conclusions of which take the form of a decision, and the medical fitness for work certificate can not replace the expertise required by law.
3. The recommendations made by the physician, for the purposes of avoiding the neuropsychiatric overloading are not likely to change the "fit" medical notice and do not justify the " employer's suspicion of the existence of the employee's mental problems."
4. In accordance with art. 61 letter c) of the Labor Code, the employee's physical and / or mental inability to perform the duties corresponding to the position held can not be assessed by the employer, who decides that the position held is characterized by a level of stress that may be incurred by the employee which is likely to seriously affect his/her health, as long as such a conclusion does not come from a decision of the competent medical expertise and not even from the inscription where the observations of the occupational physician who has performed the periodic medical control are recorded.

CA. Ploieşti, labor conflict and social insurances, December no. 1896 of 25 March 2009, Jurindex.

The Bucharest Tribunal, Department of labor disputes and social security has partially accepted the appeal brought by the claimant SF against the defendant SC O. SRL; ordered the cancellation of decision no. xxx/30.05.2008 and the reintegration of the claimant to the position held before the termination of the individual employment contract; ordered the defendant to pay monetary damages equal to the wages indexed and updated and raised of which he/she would have benefited from the date of the individual employment contract termination and up to the effective reintegration.

In order to pronounce this sentence, the first court considered the following de facto and de jure situation:

The claimant was the employee of the defendant company, working as an analyst, and by resolution no. xxx/30.05.2008 issued by the defendant, the dissolution of the individual employment contract is ordered, starting from 30.06.2008, under art . 61 letter c) of the Labor Code, subject to a notice period of 20 working days. For the justification of the decision, it was considered that the employee has consistently demonstrated an attitude of insubordination and of contestation of the decisions taken by his hierarchical superiors, proving unable to obey the rules of an organization. The recent deeds of the claimant have been subject to a disciplinary investigation, which, through the suspicions of the existence of the employee's psychological problems caused by his behaviour, resulted only in a warning. Within the proceedings of the annual occupational medical evaluation, the employee participated to both a psychological evaluation and a psychiatric one, medical recommendations being to avoid neuropsychological overloading.

In the light of these circumstances, and as the analyst position is characterized by a high level of neuropsychological overloading, the employer has considered that the employee's health would have been radically and irreversibly prejudiced by continuing on that position, and as no vacant positions that match the ability established by the occupational physician have been identified, the support of the employment agency has been requested and dismissal of the employee has been ordered.

In relation to the provisions of art. 61 letter c) of the Labour Code, the Court considered that the physical / mental inability constitutes grounds for dismissal for reasons related to the employee unless it enables the proper performance of the task corresponding to the position held. In addition,

the law establishes that the inability must be established by the decision of the medical expertise competent bodies.

Or, in the present case, the only medical document to support the dismissal decision was the medical fitness for work certificate issued by the medical unit, which shows that, on 19.05.2008, the employee was deemed medically fit and that he is only recommended to avoid neuropsychological overloading.

The first court has also established that the dismissal decision is unlawful because the occupational physician conclusion, meaning that the employee is physically and mentally fit or the held position, it does not constitute valid grounds for the termination of the individual employment contract under art. 61 letter c) of the Labor Code, particularly since such a certificate is not the decision of the medical expertise competent bodies.

As it is about the physical and / or mental inability of the employee, his/her fault is excluded, though, ignoring this reality, the employer mentions, in the decision for dismissal, the insubordination attitude of the claimant and his/her inability to obey to the regulations of an organization, matters relating to improper conduct, which may constitute the grounds for a possible disciplinary action.

The defendant appealed against this sentence, in due legal time.

Looking at the appealed sentence through the critics, the Court considered that the appeal is not grounded and should be dismissed as such, for the reasons which will be outlined below:

The first court has correctly considered that the employer has ordered the employee's dismissal under Art. 61 letter c) of the Labor Code, so that the appellant's statements according to which the claimant has a repeated misconduct are irrelevant. As it is a case of physical and / or mental inability, the employee's guilt is excluded in taking the measure of dismissal.

The Court found that the trial court has correctly interpreted the evidence in the case and gave a correct interpretation and application of the legal provisions that have not been correctly identified. According to Article 76 of the Labor Code, a dismissal decided by infringing the procedure provided for in the law shall be null and void, and in accordance with art. 77 of the same code, in case of labor dispute, the employer may not plead in court other reasons in fact or law than those mentioned in the decision of dismissal. Therefore, the first court has examined the legality of the dismissal in terms of art. 61 letter c) of the Labor Code, indicated by the employer as grounds for dismissal, in the content of the decision of dismissal.

According to the mentioned legal text, the employer may order dismissal where, by decision of the medical expertise competent organs, there is physical and/or mental inability of the employee, which prevents him/her from fulfilling his/her duties corresponding to the position owned. Thus, the inability must be established by the medical expertise competent organs by decision, as the trial court has correctly considered. In the present case, appellant-claimant was not subjected to such expertise, the conclusions of which take the form of a decision, and the medical fitness for work certificate can not replace the expertise required by law.

Moreover, from the content of the medical fitness for work certificate, signed by the occupational physician, where both the appellant's job/position and his/her workplace are mentioned, it turns out that the appellant is unfit for work. Physician recommendations for the purposes of avoiding neuropsychological overloading are not likely to change the "fit" medical notice and do not justify the "employer's suspicion of the existence of the employee's mental problems", the Court found that the employee's work ability has been generically assessed, absolutely, as appellant claims, but in concreto with reference to the owned work.

In accordance with art. 61 letter c) of the Labor Code, the employee's physical and / or mental inability to perform the duties corresponding to the position held can not be assessed by the employer, who decides that the position held is characterized by a level of stress that may be incurred by the employee which is likely to seriously affect his/her health, as long as such a conclusion does not come from a decision of the competent medical expertise organs and not even from the inscription where the observations of the occupational physician who has performed the periodic medical control are recorded.

As, from the evidence presented in the case it does not come out that keeping the employee on the position held is medically contraindicated , and the new document filed in the appeal does not contain a different conclusion. The Court has considered that the first instance court has correctly found the decision of dismissals as being unlawful and ungrounded.

Comment:

Under the terms of the legal analysed text, the employer may order dismissal where, by decision of the medical expertise competent organs, there is the physical and/or mental inability of the employee, which prevents him/her from fulfilling the duties corresponding to the position owned. Thus, the inability must be assessed by the medical expertise competent organs, by decision, the employer must not decide himself/herself whether his/her employee is fit for work or not, despite the power of direction, guidance, and control that he/she holds in the unit.

2.5.2. Dismissal for reasons related to the employee pursuant to art. 61 para. (1) letter c)of the Labour Code. The employer's obligation to address the local employment agency before the employment contract is terminated. Failure to request support for the employee redistribution. Consequences.

1. The employer has obligations under art. 64 para. (1) and seq. of the Labor Code, as follows: "(1) if the dismissal is decided for the reasons provided for in art. 61 letter c) the employer shall propose the employee's other vacant positions in the unit, consistent with the employee's education / training, or where appropriate, with the work ability determined by the occupational physician. (2) If the employer does not have any vacant position, according to paragraph 1, he/she is required to seek local employment agency support in order to redistribute the employee, according to his/her education/training and/or, where appropriate, to his/her work ability established by the occupational physician".
2. The employer has not seriously fulfilled his/her obligation to seek support from the local employment agency, as he/she has just informed this institution about the fact that as of June 1, 2009 the employment contract of the employee shall be terminated, without waiting for any answer. It is also observed that the address was issued on 22 May 2009, on Friday, without any evidence of the date of communication to the local employment agency and the decision of terminating the employment contract (corrected) was issued on 25 May 2009, on Monday.
3. According to art. 64, para. (4) of the Labor Code, an employee shall have a deadline of three working days from the notification of the employer, in order to express his/her written agreement on the newly offered position, and if the employee does not express his/her written agreement within the deadline provided for above, and after notifying the local employment agency, the employer may dismiss the employee.
4. The employer's obligation to address the local employment agency prior to the termination of the employment contract and not concurrent, as he/she is required to provide a real and serious protection of his/her former employee, and not to fulfil an absolutely formal obligation, the right to social security and to a decent standard of living is enshrined in the Constitution and the European Convention on Human Rights.

CA. Bucharest, s. a Vll-a civ., labor conflicts and social insurances, December no. S27/R of 1 February 2010, Jurindex

By the application filed with the Calarasi Court, Civil Divisio, on June 22, 2009 , the claimant SN No appealed against the resolution no. 240/16854/L of 25 June 2009, issued by the defendant C.N.P.R. SA - D.R.D.P. Constanta, requesting that the decision to be pronounced quashes this resolution and decides on the position held before the termination of the employment contract, and orders the defendant to pay the salary entitlements from the termination of the employment contract up to his reintegration, updated with the inflation index.

The civil sentence no. 1224 of 1 October 2009, Calarasi Cour, the Civil Division accepted the appeal, quashed the decision no. 240 16854 / L of 25 June 2009 issued by the defendant, ordered the reintegration of the claimant on the position owned before the abovementioned

resolution, namely the postman in OPDC Calarasi - Calarasi County Office, ordered the defendant to pay the claimant the salary entitlements from the date of termination of the employment contract (June 1, 2009) to the effective reintegration, calculated on a gross monthly salary of 1.325 lei.

The grounds of the case state that, by the resolution no.240/16854/L of 25 June 2009, the defendant ordered, as of June 1, 2009, the termination of the claimant employment contract in accordance with Art. 61 letter c) and Art. 64 para (2) of the Labor Code (dismissal by the competent expert medical report bodies, a physical inability is assessed, not allowing her to fulfill the duties corresponding to the position owned). The abovementioned decision was amended by decision no. 240/201II of 9 June 2009, meaning that the correct date of issuance of the decision no. 240/16854 is 25 May 2009. The defendant attached the letter no. 240/18116 of 22 May 2009, informing the Local Employment Agency of Calarasi County that, as of June 1, 2009, the employment contract of the employee SN shall be terminated, according to art. 61 letter c) and Art. 64 para. (2) of the Labor Code. The following have also been attached to the case: the organizational staffing table of the Calarasi town and a calculation sheet (letter no. 240/27917 of 14 August 2009) of the salary entitlements requested by the claimant, according to whom her gross salary amounted to 1.325 lei a month before dismissal.

According to art. 64, para. (2) of the Labor Code, „if the employer does not have any vacant position, according to paragraph 1, he/she is required to seek local employment agency support in order to redistribute the employee, according to his/her education/training and/or, where appropriate, to his/her work ability established by the occupational physician".

In the present case, the defendant employer ordered the termination of the employee's contract employment and issued this decision no. 240/16854/L of 25 June 2009, but it does not contain the list of all the available jobs in the unit and the timeframe within which the employees may opt to fill a vacancy, in accordance with Art. 64 as compulsory in art. 74 letter d) of the Labor Code. Moreover, the defendant failed to seriously fulfill its obligation to address the local employment agency, as it has only informed this institution (as reflected in the content of the letter in the file) about the fact that as of 1 June 2009, it will terminate the claimant's employment contract, without waiting for an answer. It is also observed that the letter was issued on 22 May 2009, on Friday, without any evidence of the date of communication to the local employment agency and the decision of terminating the employment contract (corrected) was issued on 25 May 2009, on Monday.

According to art. 64, para. (4) of the Labor Code, an employee shall have a deadline of three working days from the notification of the employer, in order to express his/her written agreement on the newly offered position, and if the employee does not express his/her written agreement within the deadline provided for above, and after notifying the local employment agency, the employer may dismiss the employee.

It comes out that the employer's obligation to address the local employment agency prior to the termination of the employment contract and not concurrent, as he/she is required to provide a real and serious protection of his/her former employee, and not to fulfil an absolutely formal obligation, the right to social security and to a decent standard of living is enshrined in the Constitution and the European Convention on Human Rights.

Given, therefore, that the measure taken by the defendant was taken by the violation of provisions of art. 64 and art. 74 letter d) of the Labor Code, decision no. 240/16854/L of 25 June 2009 is null and void. Under art.78 para.(1) of the Labor Code, the defendant was ordered to pay to the claimant the salary entitlements, from the termination of the employment contract (1 June 2009) up to the effective reintegration, calculated on a gross monthly salary of 1.325 lei.

Against this judgment the appellant-respondent C.N.P.R. SA - D.R.D.P. Constanta made a grounded, criticizing the sentence on the following grounds of unlawfulness and groundlessness.

Analyzing all the relevant evidences administered in the case through the criticisms made in the appeal, in accordance with art. 304^1 of the Civil Criminal Procedure the Court found that the appellant-defendant C.N.P.R. SA - D.R.D.P. Constanta appeal is not grounded, for the reasons to be given below:

According to art. 61 letter c) of the Labour Code, the employer may order dismissal where, by decision of the competent organs of medical expertise, there is a physical and / or mental inability of the employee, which does not allow him/her to perform tasks appropriate to the position owned.

According to art. 64, para. (1) and (2) of the Labor Code if the dismissal is decided for the reasons provided for in art. 61 letter c) the employer shall propose the employee's other vacant positions in the unit, consistent with the employee's educatio/training, or where appropriate, with the work ability determined by the occupational physician, or, if the employer does not have any vacant position, he/she is required to seek local employment agency support in order to redistribute the employee.

Article 73 of the Labour Code states that the persons dismissed on the basis of art. 61, letter c) shall have the right to a notice of at least 15 working days. On the other side, art. 74 of the Labor Code regulates the form and the content of the dismissal decision, stating that the dismissal decision shall be communicated in writing to the employee, and it must contain the reasons leading to the dismissal, the list of all the workplaces available in the organization and the deadline within which the employee may choose to fill a vacancy, under the terms of art. 64. Therefore, according to art. 74, para. (1), letter c) of the Labor Code, the dismissal decision must contain the length of notice, thus understanding both the duration (number of notice days) and specifying the date on which the notice period began to run and its expiration date, to verify if the dismissal decision was expired or has been suspended when the dismissal decision has been taken (art. 74, para. (2) of the Labor Code.

Through decision no. 240/16854/L of 25 June 2009, the defendant ordered, starting from June 1, 2009, the termination of the claimant's employment contract, in accordance with Art. 61 letter c) and art. 64 para. (2) of the Labor Code (dismissal by the competent expert medical report bodies, a physical inability is assessed, not allowing her to fulfill the duties corresponding to the position owned. The abovementioned decision was amended by decision no. 240/20111 of 9 June 2009, meaning that the correct date of issuance of the decision no. 240/16854 is 25 May 2009. The appealed decision contains no mention on the notice period and its length, thus infringing the legal provisions on the mandatory content of the dismissal decision. The lack of the mandatory provisions expressly required by law, is, according to art. 76 para. (1) C. labor, cause for nullity and void of the dismissal decision, for reasons related to the employee, leading to its abolition as unlawful.

As such, the first court solution is correct, but considering that the motivation that makes superfluous the grounds of appeal raised by the appellant-defendant CNPR SA - D.R.D.P. Constanta, reasons that can not change the solution of the case and the null and void nature of the dismissal decision, even if grounded.

The right to a fair trial guaranteed by art. 6.1 of the European Convention on human rights and fundamental freedoms, includes, inter alia, the right of the parties to submit their observations they deem pertinent to their cause.

Since the Convention is not intended to guarantee rights of theoretical or illusory but of practical and effective rights (*Artico v. Italy* judgment of 13 May 1980, Series A no. 37, p. 16, para. 33), this right can not be considered effective only if these observations are actually heard , that properly considered by the court. In other words, art. 6 implies, in particular, as "the task" of the court, the obligation to carry out an effective examination of the means, arguments and evidence of the parties, at least to measure their relevance [*Perez v. France judgment* (GC), no. 47.287/99, para. 80, ECHR 2004-1, and *Van der Hurk v. the Netherlands judgement*, 19 April 1994, Series A. no. 288, p. 19, para. 59. The obligation that art. 6 para.1 requires to the national courts, to give reasons for their decisions, does not assume the existence of a detailed answer to every argument (Perez Judgment, para. 81, Van der Hurk judgement, para. 61; *Ruiz Torija Judgement*, para. 29, see also *Jahnke and LENOBLE Judgement* against France, no. 40.490/98, ECHR 2000 - IX).

For these reasons, the Court, under Art. 312, of the Civil Procedure Code, rejected the appeal made by the appellant - defendant CNPR SA - D.R.D.P. Constanta as not being grounded.

Comment:

According to art. 64, para. 4 of the Labor Code, an employee shall have a deadline of three working days from the notification of the employer, according to art. 64, para.1, in order to express his/her written agreement on the newly offered position, and if the employee does not express his/her written agreement within the deadline provided for above, and after notifying the local employment agency, the employer may dismiss the employee. Therefore, the employer's obligation to seek support from the Local employment agency is prior to the termination of the employment contract, and not concomitant to it, as he/she is required to provide a real and serious protection of his/her former employee, and not to fulfil an absolutely formal obligation, the right to social security and to a decent standard of living is enshrined in the Constitution and the European Convention on Human Rights.

2.5.3. Dismissal for physical inability. Lack of vacancies that correspond to both the education/training and the work ability of the employee

1. According to art. 61 letter c) of the Labour Code, the employer may order dismissal where, by decision of the competent organs of medical expertise, there is a physical and/or mental inability of the employee, which does not allow him/her to perform tasks appropriate to the position held.
2. Since the employee is unable for the work he/she performs under the employment contract, the employer is obliged to propose him/her other vacancies in the unit, consistent with the education / training and work capacity determined by the occupational physician, obligation under art. 64 para. (1) of the Labor Code.
3. If there are no vacancies consistent with the employee's education / training and ability to work as established by the occupational physician, the employer must notify the employment agency, according to the provisions of art. 64 para. (2) of the Labor Code.
4. Providing a position with partial duties which the employee can not meet is not a legal constraint for the employer, but his/her option, without which the employee may not invoke the nullity of dismissal.

CA. Bucureşti, s. a VIl-a civ., labor conflicts and social insurances, December no. 3275 of 13 May 2009, Jurindex

By the civil sentence no. 6886/06.11.2008, the Bucharest Court, Division VIII, labor conflicts and social insurances, rejected the request made by the claimant D.E. against the defendant Embassy E. of B., as not being grounded.

To pronounce this sentence, the court considered that by the challenged decision the termination of the claimant's employment contract has been ordered under Art. 61 letter c) of the Labor Code, because the medical fitness for work certificate issued by the occupational physician shows that the employee was unfit for the work he was performing, namely carrier, because he was suffering from back disorders, which did not allow him to perform the duties appropriate to the position owned.

The Court found that the dismissal decision was issued in writing within 30 calendar days from the date of finding the dismissal cause, factly and lawfully grounded, providing for the term in which it could be challenged and the competent court to address.

The trial court applied Art. 56 letter f), art. 61 letter c) and d), art. 64 para. (1) of the Labor Code, from the title list and certificate of 21.07.2008 and it came out that, on the day the employee was dismissed there were no other vacancies within the defendant institution consistent with the employee's training, and in the present case, with the employee's ability to work as established by the occupational physician; in these circumstances, the Embassy notified the employment agency B., according to the provisions of art. 64 para. (2) of the Labor Code.

The Court also considered that although there was no vacancy consistent with the employee's ability to work and his training and wages accordingly, the employer's good faith resulted from the fact that he tried to change the position owned by the claimant, in the sense establishment of other tasks (painting, sweeping), but the employee has not agreed to change the employment contract. Thus, given these facts, the trial court considered that the claimant's

accusations according to which the employer has infringed art. 64 of the Labor court when dismissing him, are not grounded.

The court considered that the decision challanged by the claimant complies with the formal requirements of the law, it expressly stating that there are no vacancies consistent with the training/education and work capacity of the employee.

Moreover, the Court considered that the employer has proven in the labor dispute that has fulfilled his obligations under the labor law and that at that time there were no vacancies consistent with the training/education and work capacity of the employee as established by the occupational physician.

The trial court considered that the respondent has complied with the provisions of art. 64 para. (5) and art. 61 letter c) of the Labor Code, paying to the employee, by the payment order no. 14883/22.07.2008 the amount of 708 euros by way of compensation. As it comes put from the content of the abovementioned document, the amount has been paid in respect of the remuneration of July 2008, during which the employee has received the notice required by art. 73 of the Labor Code.

The Court considered that the lack of mention of the compensation provided by law for dismissal pursuant to art. 61 letter c) of the Labor Code, does not determine its nullity, for which the Court considered that it can not accept the claimant's submissions in that he has suffered an injury by failing to mention, in the dismissal decision, the amounts owed by the employer to the title, as the compensation to which he is entitled under the provisions of art. 64 para. (5) are provided by law and he may require his right correlative obligation meeting at any time during the right of action.

The appeal against the sentence above has been rejected as ungrounded for the following reasons:

On the merits of the case, the Court considered that the trial court has correctly considered that the dismissal decision is legal and thorough.

Thus, as the claimant-appellant has been declared unfit for the carrier position he was performing under the employment contract concluded with the defendant, as employer, and the latter had no vacancies consistent with the claimant's education/ training and work capacity, as it comes put from the evidence managed in the case, the enforcement of art. 61 letter c) of the Labor Code is fully justified.

The claimant application can not be accepted in the sense that it could opt for certain tasks in the legal employment relationship, since they did not subsume in a post included in the defendant's job list. Providing a position with partial duties which the employee can meet is not a legal constraint for the employer, but his option, which he manifested in the negotiations for the possible modification of the existing employment contract, the claimant has rejected it, considering that it worsens his illness. It also can not accepted any claimant's statement to the effect that the appellant would not have been able to opt for new tasks, whereas, the minutes filed states that he has expressly refused the proposed tasks.

As for the employer's fault for not having made the appropriate occupational safety briefing, which would have given rise to back disorders, the Court considered that this fact does not affect the lawfulness of the decision to dismiss, as it is a question of economic responsibility of the employer, the court has not been informed about, as no occupational disease which can lead to the classification of the claimant in a degree of disability with the consequence of allowing the right to a form of social assistance has not been established.

Comment:

According to art. 64 of the Labor Code, in case of dismissal for medical reasons, the employer shall propose the employee's other vacant positions in the unit, consistent with the employee's education/training, or where appropriate, with the work ability determined by the occupational physician. If the employer does not have any vacant position, according to paragraph 1, he/she is required to seek local employment agency support in order to redistribute the employee,

according to his/her education/ training and/or, where appropriate, to his/her work ability established by the occupational physician.

The employee shall have a period of 3 working days from the notification of the employer, according to paragraph 1, to show his/her written consent for the new provided job/position.

In this case, the employee did not accept the new job provided, therefore, the employer has fulfilled the obligation imposed by art. 64, the future issue of the dismissal decision is legal.

The fact that the employer has provided the employee a new job whose job responsibilities partially covered the employee competence may not result in any way, in the liability of the first.

3. Conclusions

Dismissal for medical reasons is one of the cases of termination of the individual employment contract by the employer, which excludes the employee's fault.

Based on the objective medical nature, we consider as useful suggestion of the *lege ferenda*, that where the employer chooses to dismiss the employee under art. 61 letter c of the Labour Code, meanwhile not having any vacancy in the unit, the termination of his/her employment contract shall occur.

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