Theoretical and practical references regarding the applicability of the employer's obligation to inform the employee

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Abstract

The obligation to inform the employee is one of the most important obligations of employers in labor relations. Regulated by art. 17-19 of The Labor Code, the employee's obligation to inform the employee is the subject of controversy in doctrine and practice. In this study we will analyze the applicability of the information obligation and make proposals for lege ferenda on the basis of the arguments presented.

Keywords: *employer's obligation to inform the employee, Labor Code, de lege ferenda proposals.*

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1. Introduction

Employer's obligation to inform the employee or the person selected for the employment represents one of the most important obligations of employers within work relationships.

In accordance with article 17(3) of the code, the employer shall inform the employee or the future employee about any minimal aspects relating to the carrying out of work[2].

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[2] This is information about:

a) parties' identity;
b) job or in the absence of a fixed job the possibility for the employee to work in different places;
c) employer's headquarters or domicile, as the case may be;
d) position/trade according to the Classification of Occupations in Romania or other legislative instruments such as job description specifying the job attributions;
e) assessment criteria of employee's professional activity at employer level;
f) job specific risks;
g) the date since when the contract is going to produce effects;
h) in case of a fixed-term employment contract or a temporary employment contract, the duration thereof;
i) the duration of medical leave the employee is entitled to;
j) conditions for the contracting parties to give notice and the duration thereof;
k) the basic wages, other elements constituting the income and the frequency of paying wages the employee is entitled to;
l) normal duration of work expressed in hours/day and hours/week;
m) indication of the collective employment contract regulating employee's work conditions;
n) duration of the probationary period

The obligation to inform the employee is regulated at EU level by Directive 91/533 / EC on the obligation of the employer to inform employees of the conditions applicable to the contract or employment relationship.

If the employee must provide work abroad, the obligation of information shall involve certain additional specifications[3].

The provisions of the Labour code relating to the obligation of information shall be corroborated with the provisions of the Law no. 467/2006 on the general framework for employees' information and consultation[4].

2. Limits of employer's obligation to inform he employee

A) Bucharest Court of Appeal has recently ruled in these matters by settling through the Judgment in civil matters no. 848/2017 a case having as object exactly the limits of content of the information obligation upon employment[5].

On the substance, the employee was fired by the employing company following the collective firing procedures due to reorganization following the merger between the employing company and another company.

Employer's job together with other 49 jobs were terminated and following the selection process, the employee came on the last place among the candidates who chose to occupy a job like the one that had been terminated.

Following the dismissal, the employee requested the first instance "the cancellation of the dismissal decision, plaintiff's reintegration in the previously held job, to order the respondent to pay damages equal to the wages indexed, increased and updated with the other rights they would have enjoyed according to the degree and position occupied previously since the time of dismissal until the actual reintegration, the payment of 500,000 lei as moral damages and 1,500,000 lei for moral damages following the premeditated omission of plaintiff's information (during recruiting and upon the signature of the employment contract) regarding a fundamental element, namely the merger (between the employing company and another company) as well as to order the respondent to pay the court fees"[6].

The employee said, among other things, that they were employed in a multinational company where they occupied a good job being appreciated at work,

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[3] Pursuant to article 17(3) of the Labour code, it refers to:
a) the duration of the work period that is going to be provided abroad;
b) the currency for the payment of wages and the payment methods;
c) in cash and/or in kind services afferent to the activity carried out abroad;
d) climate conditions;
e) main regulations in the work legislation of that country;
f) local customs whose non-observance might endanger their life, freedom or personal safety;
g) worker's repatriation, as the case may be.

[4] Published in the Official Journal no. 1006 of December 18th 2006.

[5] Bucharest Court of Appeal, 7th Division for work conflict and social security cases, judgment in civil matters no. 848 of February 14th 2017 presented in the National jurisprudence. Selection made by Judge Amelia Farmathy (with a note by the same author) in R.R.D.M. no. 4/2017 pp. 196-214.

[6] National jurisprudence, *op. cit.*, p. 197.

a fact demonstrated by the email sent by the general manager of the multinational company to employee's former colleagues at the time of his resignation where he presented the plaintiff's qualities and contribution to such company.

If they had been informed about company's situation in terms of the imminent merger, the employee would not have quitted his job knowing the risks afferent to merger in terms of job stability.

The first instance partially admitted the request, namely the count regarding the payment of 1,500,000 lei and rejected plaintiff's other counts.

To motivate the partial admission of the request, the tribunal ruled as follows among other things : "the first instance court held that during the carrying out of the recruiting procedure the parties exchanged information, the respondent having the obligation to notify the plaintiff about the fact that they were involved in a merger process, a piece of information that might or might have not changed radically plaintiff's decision of concluding and signing the employment contract with the respondent and implicitly of interrupting the work relationships with the employer at that time... the prejudice suffered by the plaintiff is non-material since it consisted in the prejudice brought to their dignity, honour and reputation through the failure to communicate during the negotiations of the contract clauses the fact that the employer was in a merger process with other company and the fact that the company had merged with other company before the signature of the employment contract"[7].

Only the employer lodged an appeal at Bucharest Court of Appeal against tribunal's decision, while the employee did not contest the decision in terms of the other rejected requests.

The Court of Appeal admitted employer's appeal by cancelling the decision of the first instance regarding the granting of moral damages for the failure to fulfil the information obligation in an adequate manner.

The decision of the court of appeal relies mainly on the following argumentation:

- the fact that the legislator used the phrase "they shall be informed at least about the following elements confirms the hypothesis that legislator's enumeration is only exemplifying, according to the concrete situation in question, as the information about other aspects could also be necessary… consequently, to continue legislator's rationale, any other additional information obligation of the employer should focus on aspects of the same nature, namely aspects regarding the work conditions"[8];

- taking into account the fact that company's merger does not represent an aspect focusing on the work conditions but on their own strategy for company's development, the employer was not compelled to communicate it; moreover, the court confirms the quoted decision as the obligation of information relating to

[7] National jurisprudence, *op. cit.*, p. 203-204.
[8] National jurisprudence, *op. cit.*, p. 210-211.

merger did not have to be fulfilled in case of the employment contracts already operational within the appellant company[9];

- pursuant to article 17(4) of the Code, the communicated elements must be provided in the employment contract, while the communication of merger to the employee could not have been introduced in the contract;

- the deadline within which the employee may initiate legal proceedings in order to claim for damages for employer's failure to fulfil the information obligation is 30 days since the date of non-fulfilment of this obligation (in our case since the date when they became aware of the merger);

B) In terms of procedure, the ruling of Bucharest Court of Appeal is correct knowing that the employee did not go to court within the legal 30-day deadline and also because the merger was imminent but had not yet begun specific legal procedures.

In this context, it has been affirmed that the foundation of this action on the violation of the good faith principle and not on the failure to fulfil the information obligation would have been better for the employee[10].

Employer's obligation to inform employees or the person selected for the employment is regulated minimally by the Labour code, the legislator stipulating in article 17(3) that the person selected for employment or the employee, as the case may be, shall be informed about ***at least*** (*emphasis added by us R.S.P.)* the following elements:…

The phrase *at least* leaves employer the liberty to inform the employee or the future employee about other essential elements as well regarding the work relationships according to each job and the situation of each employer.

This is a situation similar to the legal provisions in terms of internal regulation, namely article 247 of the Labour code establishing a minimal content for the internal regulation.

We believe that a possible response would be to the provisions of Law no. 467/2006 on establishing the general framework for information and consultation of employees.

The above-mentioned law stipulates in article 5(1) as follows: Employers shall inform and consult employees' representatives, under the law in force, about:

a) the recent evolution and the probable evolution of company's activities and economic situation;

b) the situation, structure and probable evolution of workforce within the enterprise as well as about the potential forecast measures envisaged especially when there is a threat for jobs;

c) the decisions that may lead to important modifications in work organization, in the contractual relationships or in the work relationships, including the ones provided by the Romanian legislation regarding the specific procedures of information and consultation in case of mass redundancy and the protection of employees' rights in case of enterprise transfer.

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[9] National jurisprudence, *op. cit.*, p. 212

[10] For this purpose also see *A. Farmathy in Jurisprudență națională, op. cit.*, p. 214.

These aspects may be subject to the obligation to inform the future employee at the time of employment.

Other matters that could be subject to the obligation to inform: the imminent change in the employer's headquarters in another locality or even in another sector in Bucharest, major changes in the employer's structure (for example, in the present case, if the merger procedures were triggered, the employer was obliged to communicate them to the employees or to the future employees).

Nobody opposes the parties to include in the information obligation issues regarding the presentation of the career opportunities of the employee within the firm.

C) The obligation to provide information must also be filled in with the individual performance objectives of the employees, and this is necessary *de lege ferenda* proposal since the legislator stipulated among the mandatory elements to be communicated to the selected person in the view of the employee / employee the evaluation criteria of the employee's professional activity applicable to the employer but not the performance targets (if any), which is a significant regulatory gap[11].

3. Conclusions

The employer's obligation to inform the employee is not exhaustively regulated by the legislator, which sets out only the minimum elements which are the subject of this employer's legal obligation so the employer has to inform the employee or the person selected for employment about other essential elements that can influence the working relationship

The social partners (by collective labor agreement) or the employer under internal regulation may establish new issues that are subject to the information obligation.

These aspects are consistent with the principle of good faith and the character of *intuitu personae* of the individual labor contract.

As regards the character of the *intuitu personae* of the individual labor contract, as compared to the legal person's employer, it was stated that, although dimmed, this character is preserved[12].

Regarding good faith in working relations, art. 8 par. (1) of the Labor Code provides that employment relationships are based on the principle of consensus and good faith.

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[11] A se vedea C.A. Moarcăș Costea, *Evaluarea salariaților în raport cu criteriile de performanță și natura juridică a obligațiilor specifice contractului individual de muncă,* in „Modificările Codului muncii și ale Legii Dialogului Social", Ed. Universul Juridic, București, 2011, pp. 25-55.

[12] I. T. Ștefănescu, *Tratat teoretic și practic de drept al muncii,* 3rd edition revised and added, Ed. Universul Juridic, Bucharest, 2014, p. 230.

Good faith refers to loyalty, fidelity and co-operation from birth to termination of the individual or collective labor contract[13].

Thus, the information obligation may include aspects regarding the economic situation of the firm, the situation, the structure and likely evolution of employment within the enterprise, the decisions that can lead to important changes in the organization of the work, such as moving the employer's headquarters to another location, as well as the individual performance objectives of the employees or professional development within the firm.

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2. I. T. Ștefănescu, *Tratat teoretic și practic de drept al muncii*, 3rd edition revised and added, Universul Juridic Publishing House, Bucharest, 2014
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II. Legislation

1. Law no. 53/2003 (Labor Code).
2. Law no. 467/2006 on the general framework for employees' information and consultation.

[13] See I. T. Ștefănescu (coordinator), *Codul muncii și Legea dialogului social, Comentarii și explicații,* Ed. Universul Juridic, Bucharest, 2017, p. 36; Raluca Dimitriu, *Dreptul muncii. Anxietăți ale prezentului*, Rentrop&Straton Publishing House, Bucharest, 2016, p. 54.