

Individual Dismissal from the Perspective of the Employer and Specific Regulations if Bankruptcy of the Company in Romania

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Abstract

Individual dismissal is individual employment termination as a result of the effective abolition of the position held by the employee, for one or more reasons not related to his person, based on actual cause real and serious under art. 65 Romanian Labour Code. It should be noted that the practice shows that, at present, the reasons are, in fact, the same: economic, technological, organizational. As for checking the validity of the plea raised by the employer, it falls within the jurisdiction of the courts seised of the appeal dismissed employee.

By law no. 85/2014 on procedures to prevent insolvency and insolvency to set a new insolvency regime by repealing the previous law no. 85/2006 regarding the same.

We consider that art. 123 of Law no. 85/2014 does not cover a new hypothesis for the termination of individual employment contract, but a reflection of the provisions of the Romanian Labour Code. In reality, it does not simply embodies, in principle, the possibility of individual labor contract parties to unilaterally terminate the contract, the obligation to respect the right that the period of notice. Art. 123 para. 1 is not the individual employment contracts, and art. 123 para. 7 generic enshrines the right of both parties to terminate the contract of employment. Alin. 8 of the same article regulates the right of the employer to the employee's dismissal of individual or collective. In conclusion, art. 123 is an application of art. 65 et seq. of the Romanian Labour Code, the applicable individual or collective dismissal procedure covered by these texts.

Keywords: Individual dismissal, employer, specific regulations, bankruptcy of the company

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Introduction

Individual dismissal is individual employment termination as a result of the effective abolition of the position held by the employee, for one or more reasons not related to his person, based on actual cause real and serious under art. 65 Romanian Labour Code.

Currently the art. 65 of the Romanian Labour Code governs the legal framework, at present, the individual dismissal. Abolishing the workplace must be effective and have a real and serious cause.

By Law no. 85/2014 on procedures to prevent insolvency and insolvency to set a new insolvency regime by repealing the previous Law no. 85/2006 regarding the same.

Art. 123 of Law no. 85/2014 does not cover a new hypothesis for the termination of individual employment contract, but a reflection of the provisions of the Romanian Labour Code. In reality, it does not simply embodies, in principle, the possibility of individual labor contract parties to unilaterally terminate the contract, the obligation to respect the right that the period of notice. Art. 123 para. 1 is not the individual employment contracts; art. 123 para. 7 generic enshrines the right of both parties to terminate the contract of employment, while para. 8 of the same article regulates the right of the employer to the employee's dismissal of individual or collective. Paragraph 7 usefulness is questionable, to the right of the employee to resign and that, currently, para. 8 covers both individual dismissal and the collective. In conclusion, art. 123 is an application of art. 65 et seq. of the Romanian Labour Code, the applicable individual or collective dismissal procedure covered by these texts .

1. Individual dismissal from the perspective of the employer

Individual dismissal is individual employment termination as a result of the effective abolition of the position held by the employee, for one or more reasons not related to his person, based on actual cause real and serious under art. 65 Romanian Labour Code.

Currently the art. 65 of the Romanian Labour Code governs the legal framework, at present, the individual dismissal. Abolishing the workplace must be effective and have a real and serious cause (Moțiu, 2012).

It should be noted that the practice shows that, at present, the reasons are, in fact, the same: economic, technological, organizational. As for checking the validity of the plea raised by the employer, it falls within the jurisdiction of the courts seised of the appeal dismissed employee.

Conditions of existence

Individual dismissal foundation lies in the effective abolition of the position held by the employee.

Text legally described above shall require two conditions to operate legally, an individual dismissal not related to the employee (Ștefănescu, 2006):

a) be some effective abolition of employment, that is true;

The effective abolition of employment is the sine qua non for the provisions of art. 65 Romanian Labour Code. This is suppressing the job/position held by the employee concerned in organizational unit and/or the positions.

The effectiveness of the abolition pursued by the legislature is the primary element of the content of art. 65 Romanian Labour Code.

During its existence, a unit may undergo certain processes of technological, economic or legal, but without these circumstances lead to a dismantling of jobs.

To determine whether the abolition of employment for a specific employee was actually necessary, without being sufficient to compare the positions or organizational unit existing at the date of dismissal of the employee with those by the employer for the period immediately following his dismissal.

In the event that after the dissolution of a specific job in a certain range, the employer shall make its re-establishment, we are in the presence of effective abolition but formal event sanctioned by absolute nullity of the measure so disposed. The same penalty is applicable if

the suspension position, setting up a job with the same powers abolished, employment, fired the employee instead of an employee with an individual employment contract of limited duration.

The effectiveness of the abolition of a job is given the actual conditions in which the employing unit at a time. It is the economic situation, social, legal, and financial. From this perspective, it can be concluded that the employer's needs are subordinated to these factors, the latter being conditioned for ensuring the smooth running of the unit. Therefore, based on the needs of the market economy works, the employer is obliged to respect and to proceed to the abolition of certain jobs, if this measure leads to the recovery of his situation, showing at the same time, in good faith in compared with its employee.

Keeping good faith of the employer to his employee in connection with the objective need to recover and survive in the market sector in which it operates must comply with the right balance imposed by the legislature.

The principal guidelines adopted on individual dismissal for reasons not related to the employee are: important changes have introduced the employer, where appropriate, in production (as product) in the program (program/scheduling production); technologies; the organization, the structure; economic difficulties employer (narrowing of outlets decrease sourced raw materials and energy, its suppliers bankruptcy); employer owes the bank and suffered a reduction in turnover; two stations are grouped into one; the fired is replaced with: a voluntary employee, partner (in partnerships), a service organization (natural or legal); employer has ceased or intends to cease business for which some progress has been employed, especially employed; business requirements through the eyes of employees' obligation to carry out work of a particular kind (type) or in a particular place or disappeared or shrank dramatically; Work was dissolved due to the loss of the only customer of the employer; are job cuts, manned contract in the public sector, according to the law; employer as a unit or subunit to (the set precise contractual employee's work) moves to another location (which is, broadly, a reorganization of the work).

It can not justify the abolition of employment and thus, the employee can not be fired in the following situations: the employer does not abolish beforehand station/similar vacancies; job title only changed without actually removed from the establishment or of the positions; Item was only suspended and not abolished; employee, overload, and was commissioned to execute the work tasks of fired (in which case, in fact, work, understand the function/post has disappeared as functional necessity); are fired two employees and both are replaced by a person - other than one of the two - holding a post of the same nature as that/those deaths; position is abolished only when the employee was assigned and the real reason of dismissal (economic or otherwise) not coexist in both units (both the one that posted the employee and the employee in question was posted) reorganization was not carried out in real purpose of increasing or maintaining competitiveness, but only to reduce a subjective assessment as too favorable situation for employees; is based solely on reducing activity and poor outcome of a compartment (in which the employee is employed), without registering difficulties across units; in other words, when unincorporated subunit (branch, agency, representation, work, etc.) with financial difficulties, is integrated society that does not face such difficulties; employer has produced deliberately financial difficulties or personal interest taken in larger amounts than allowed him normally, profit (Ștefănescu, 2014).

b) there is a real and serious cause of this abolition.

Once met the first condition is necessary and achievement of the two conditions, namely the existence of a real and serious causes that generated the abolition of employment. This is what the legislature has expressly mentioned by the second paragraph of Article 65.

A real question is based on an objective existence, being generated by the situation where the employer is. Are considered situations where effective abolition of employment is the real question that arise due to economic difficulties, technological change, reorganization activity broadly.

In the absence of a legal definition, in case of conflict, the court is the one who must make a thorough examination of legal and determining whether or not such an issue. In each case must be examined whether the case met the following characters to eliminate arbitrariness: the objective, even given the legal provisions (art. 65 par. 1 Romanian Labour Code) required by one or more reasons neinputabile employee. Therefore, any wrongful conduct of the employee is excluded, serious nature, imposed by the existence of gravity of the reasons envisaged by employer sufficiently serious reasons to impose truly reduce employment. It is necessary, therefore, that "it is a question which, with real gravity makes it impossible, without causing damage to the employer, continuation of employment, justifying thus the act of dismissal of the employee. Thus, it is required to there is a proportional relation between cause and effect." (Țiclea, 2014)

In conclusion, the reasons considered by the employer to operate redundancies must be predictable and meets the requirements described above. Otherwise, if it would not do to reduce positions, his unit will be adversely affected, irreversible.

Persons dismissed under art. 65 Romanian Labour Code are entitled to unemployment benefits to compensation as provided by law and applicable collective labor contract, to pay the wages of their rights until the termination of the contract and to receive legal measures to boost employment (under Chapter V of Law no. 76/2002 on unemployment and stimulate employment).

2. Specific regulations in case of insolvency of the employer

By Law no. 85/2014 on procedures to prevent insolvency and insolvency to set a new insolvency regime by repealing the previous law no. 85/2006 regarding the same.

Compared to the previous regulation, regulations regarding dismissal institution covered by art. 123 of Law no. 85/2014. Thus, according to art. 123 para. 1 of this law, "maintained ongoing contracts is considered the date of opening procedure, art. 1417 of the Civil Code is not applicable. Any contractual clause to terminate exists ongoing benefit period or revocation of a declaration of chargeability ground early opening of proceedings are void. The provisions relating to the maintenance of ongoing contracts and termination or acceleration clauses nullity obligations shall not apply to contracts qualified financial and operations bilateral netting under a qualified financial contract or a bilateral netting agreement. In order to increase the maximum value of the debtor's property, a limitation period of three months from the date of opening of proceedings, judicial administrator/liquidator may terminate any contracts, unexpired leases and other long-term contracts, as long as these contracts were totally or substantially all the parties involved. The receiver/liquidator must respond within 30 days of receipt, notice to the contractor, made in the first 3 months after initiation, which is required to terminate the contract; in the absence of such a response, the receiver/liquidator will never ask for performance of the contract, which is considered terminated. The contract shall be considered terminated:

- a) the expiry of a period of 30 days from the receipt of the request contracting party to terminate the contract if the receiver/liquidator is not responding;
- b) the date of notification of termination by the receiver/liquidator.

(7) An employment contract or lease as lessee, may be terminated only in accordance with the legal terms of notice.

(8) After the opening of the procedure, termination of individual debtor staff work will be done urgently by the receiver/liquidator. The receiver/liquidator will provide personnel fired only statutory period of notice. Where are the provisions of Law no. 53/2003 - Romanian Labour Code, republished, as amended and supplemented, regarding collective dismissal, the terms provided by art. 71 and art. 72 para. (1) of Law no. 53/2003, republished, as amended and supplemented, shall be reduced by half. "

In connection with the interpretation of legal texts, in the doctrine were outlined two opinions:

1) An initial review found that art. 123 of Law no. 85/2014 does not cover a new hypothesis for the termination of individual employment contract, but a reflection of the provisions of the Romanian Labour Code. In reality, it does not simply embodies, in principle, the possibility of individual labor contract parties to unilaterally terminate the contract, the obligation to respect the right that the period of notice. Art. 123 para. 1 is not the individual employment contracts; art. 123 para. 7 generic enshrines the right of both parties to terminate the contract of employment, while para. 8 of the same article regulates the right of the employer to the employee's dismissal of individual or collective. Paragraph 7 usefulness is questionable, to the right of the employee to resign and that, currently, para. 8 covers both individual dismissal and the collective. In conclusion, art. 123 is an application of art. 65 et seq. of the Romanian Labour Code, the applicable individual or collective dismissal procedure covered by these texts (Enache, 2014).

2) A second opinion stated that art. 123 para. 1 includes individual employment contracts, and art. 123 para. 1 and 7 aimed at anything but art. 65 of the Romanian Labour Code; therefore art. 123 para. 1, where individual contracts of employment, should be corroborated, necessarily, par. 7 of the same text (Beligrădeanu, 2014).

An argument in support of this opinion is that the term "termination" would constitute as legal, other than dismissal.

In our case, we rally first view that art. 123 para. One does not concern individual employment contracts, para. 7 of this Article generic enshrines the right of both parties to terminate the contract of employment, and art. 123 para. 8 regulates the right of the employer to the employee's dismissal, individual or collective, with the following additional arguments:

- the term 'dismissal' of labor law is similar to the "termination" of civil law as art. 1321 of the Civil Code, which lists the cases of termination of contracts can be compared with art. 55 of the Romanian Labour Code;
- to support the claim that the concept of "redundancy" is synonymous with the "termination" ruled Court of Justice of the European Union, in preliminary rulings, concluding that "the notion of „redundancy" within the meaning of Art. 1 para. (1) a) of Directive 98/59/EC was considered to include any termination,, junk worker without justifying reasons for the employer will correspond. "

Against this background appreciation on dismissal, appear necessary following entries:

- there must be a real and serious issue when individual dismissal;
- must respect the right to legal notice for employees;

- if you are currently a collective redundancies must carry obligation to consult with the union or employee representatives, and in the case of resuming the employer, within 45 calendar days from the date of dismissal, the employee fired by collective redundancy is entitled priority to be reinstated to the post reinstated in the same activity, without examination, contest or probation;

- are halved terms referred to art. 71 and 72 para. 1 of the Romanian Labour Code, in the case of collective dismissal (Dumitriu, 2012), i.e. at 10 days of receipt of notification of the union or, where applicable, employee representatives may propose measures to avoid layoffs employer or decrease the number of employees laid off at 5 days of receipt of the employer is required to respond in writing and reasoned proposals and at least 30 calendar days prior to the date of issue of the dismissal decisions the employer decides the measure of collective redundancy and therefore has an obligation to notify in writing the local labor inspectorate and the territorial employment agency work;

- termination/dismissal will be challenged by former employee to court only if:

a) termination/dismissal has violated the law (e.g., no notice was given);

b) termination/dismissal was made by committing an abuse of rights in violation of Art. 8 paragraph. 1 Labour Code.

Conclusions

Art. 123 of Law no. 85/2014 does not cover a new hypothesis for the termination of individual employment contract, but a reflection of the provisions of the Romanian Labour Code. In reality, it does not simply embodies, in principle, the possibility of individual labor contract parties to unilaterally terminate the contract, the obligation to respect the right that the period of notice. Art. 123 para. 1 is not about the individual employment contracts; art. 123 para. 7 generic enshrines the right of both parties to terminate the contract of employment, while para. 8 of the same article regulates the right of the employer to the employee's dismissal of individual or collective. Paragraph 7 usefulness is questionable, to the right of the employee to resign and that, currently, para. 8 covers both individual dismissal and the collective. In conclusion, art. 123 is an application of art. 65 et seq. of the Romanian Labour Code, the applicable individual or collective dismissal procedure covered by these texts.

References

- Beligrădeanu, Ș. (2014). Meaning, scope and impact measures "termination" or "dissolution" of employment contracts by the receiver/liquidator regulated by art. 123 of Law no. 85/2014 on procedures to prevent insolvency and insolvency, *Law Magazine*, no. 11, 112-125
- Dumitriu, R. (2012). Romanian views on the current regulation of collective dismissal, *Romanian Journal of Romanian Labour Law*, no. 2, 9-15
- Enache, D.G. (2014). Termination of the employer, the individual labor contract in case of insolvency pursuant to Law no. 85/2014, *Law Magazine*, no. 11, pp. 98-111
- Moțiu, D. (2012). *Individual labor law*, second edition, Bucharest: CH Beck Publishing House
- Ștefănescu, I.T. (2006). Dismissal of employees for reasons not related to their individual and collective, *Romanian Journal of Romanian Labour Law*, no. 3, 7.
- Ștefănescu, I.T. (2014). *Theoretical and practical treaty labor law, third edition, revised and enlarged*, Bucharest: Universul Juridic

- Ticlea, A. (2014). *Treaty of employment, the eighth edition revised and enlarged*, Bucharest: Universul Juridic
- Law no. 85/2014 on procedures to prevent insolvency and insolvency, Official Gazzete no. 466/25.06.2014
- Law no. 53/2003 Labour Code, republished, Official Gazzete no. 345/18.05.2011