

# THEORETICAL AND PRACTICAL ASPECTS REGARDING SOME CONSEQUENCES OF THE ANNULMENT OF THE DISMISSAL DECISION ORDERED BY THE EMPLOYER

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**ABSTRACT:** *The authors carry out an assessment of the effects of cancelling or annulling of a dismissal decision issued by the employer. The Romanian legal doctrine reveals the fact that the provisions of art.78 par., 1 and 2 of Labor Code, as they are worded, pose much difficulty in the practice of reinstatement as they pave the way to differing interpretations and jurisprudence lacking unity. As reinstatement is of utmost importance following the annulment of an illegal or unfair dismissal, several opinions have popped up; thus, there were suggested solutions to certain practical cases which—to a large extent—are analysed in the material at hand. The final conclusion is that the lawmaker has necessarily to intervene with new statutes; some of the *lege ferenda* doctrinaire proposals are to be discerned in what will follow.*

*According to the Employment Legislation, following the dismissal of an employee, there can come up two situations leading to the cancellation of the aftermath of the dismissal ordered by the employer. The first one may be the cancellation of the decision and, the second is represented by its annulment altogether.*

**KEYWORDS:** *dismissal decision, Romanian Labor Code, employer,*

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## 1. CANCELLATION OF DISMISSAL DECISION<sup>1</sup>

The employer who finds that following the issuance of the dismissal decision his/her measure is unfair or illegal and the situation may be corrected by reconsidering the initial decision, i.e., revoking it, the aftermath of the act as such is annulled.

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<sup>1</sup> Al. Athanasiu, Aspecte teoretice și practice ale revocării deciziei de desfacere disciplinară a contractului de Muncă și a deciziei de imputare, in Revista Română de Drept nr.3/1994 ; L.C. Duțescu, Revocarea deciziei de concediere disciplinară, in R.R.D.M. nr.6/2007

Cancellation is an one-sided act of the employer's will allowed by the law and it can "step in even after the court's complaint against the dismissal. However, it is possible only till the remaining final of the court's decision to maintain it; otherwise, the principle of the authority of the judged matter<sup>2</sup> would be encroached. Cancellation can intervene even in the situation when the former employee has been reinstated with a different employer.<sup>3</sup> According to art.268 par. 3 in the Employment Code a decision of disciplinary sanctioning can produce its effects on notice day and for cause identity, a decision of cancellation of a sanction will also produce its effects on the day day it has been communicated. Failure to communicate the cancellation decision makes impossible the occurrence of the effect of cancellation, i.e., the reinstatement of the parts in the previous situation, respectively the reinstatement of the part punished in the position previously detained<sup>4</sup> From formal point-of-view cancellation should be in the form of a decision and go by the following validity conditions:

- a) The cancellation act is to be drawn up in written form and communicated to the parts involved;
- b) To come from the same authority that issued the dismissal;
- c) To observe the validity conditions regarding the unilateral legal acts;
- d) The cancellation should be justified on grounds of illegality or/and groundlessness.

When cancellation intervenes during solving of complaint against the dismissal decision, literature has it that there should be assessed that the effect produced leads to the termination of litigation and the appeal will be dismissed as objectless<sup>5</sup>.

## 2. CANCELLATION OF DISMISSAL

The dismissed employee has the legal possibility to challenge the dismissal decision and to ask the court to annul the act incriminated. The reasons for asking for the annulment of the dismissal decision are groundlessness, illegality and the employer perpetrating a legal abuse. As a matter of fact, the Employment Code in its art.78 par.1 foresees that the court shall dispose the annulment of the dismissal decision in case that the employee has been unfairly dismissed, i.e., groundlessly or unlawfully.

The groundless- or illegal character of dismissal—as a rule—has reasons either regarding the trespassing of the procedure rules or regarding the trespassing of the regulations connected to the form bound to dismissal and more often than not, overlooking the compulsory elements pertaining to the contents of the dismissal decision.

When the Court invested with the challenging of dismissal finds that the cancellation of the employment contract is not seriously founded or, it is not legal, it will pass on to the annulment of dismissal, based on the legal foundation of art.78 in the Employment Code.

<sup>2</sup> Al.Țiclea, *Tratat de dreptul muncii*, 4th edition, Ed. "Universul juridic", București, 2010, p.671

<sup>3</sup> I.T. Ștefănescu, *Tratat theoretic și practic de drept al muncii*, Ed. Universul Juridic, București, 2010, p.444

<sup>4</sup> Court of Appeal Bucharest, civil section VII also for causes regarding employment-and social security conflicts—Civil Decision no.1021/R of February 25, 2010, in R.R.D.M. no.3/2010, p.77-84

<sup>5</sup> *Idem*, p.672

The annulment of dismissal verdict produces two very important effects : payment of certain compensations and a possible reinstatement of the challenging employee.

Art.78 par.1 in Employment Code has been brought an action against in the Constitutional Court as unconstitutional. Following the inquiry carried out, the Court issued a verdict asserting that the text of the law involved “has for hypothesis the dismissal of an employee groundlessly or illegally, fact that has to be ascertained within a trial to be carried out by observing the principle of contradictorality and based on relevant and convincing evidence.” Only following the correct ascertainment of the fact involved will the Court dispose the annulment of dismissal and constrain the guilty employer to pay damages equalling the indexed-, increased- and up-to-date wages as well as on line with the other rights the employee might have been benefitted. Depriving the employee of these rights represent an actual prejudice suffered regardless of the fact that during the lapse of time between date of dismissal and that of reinstatement he or she has or has not gained income from other sources. The employee cannot take advantage of this right as it is enjoyable solely when the groundlessness or illegality of the one-sided dismissal— i.e., from the part of the employer—is established.

Consequently, the law text examined does not contain any measure whatsoever as to bar the free access to justice or, the possibility of both parties to take advantage of all procesual means and guarrantees, suggesting and administering the evidence necessary to sustain and defend legitimate rights and interests including the exercise of legal means of contesting, which condition and grant the unfolding of a fair trial. Similarly, the provisions do not affect in any way whatsoever the principles of independence and impartiality of the justice and judges”<sup>6</sup>.

From the wording of art.78 par. 1 in Employment Code there results that following the annulment of the dismissal decision, the employer must be coerced to pay damages even if the employee does not ask for them. It is appraised that “this text sets up an **exception from the principle of availability**, as the Court has—in certain instances—to give more than it has been asked to”<sup>7</sup>.

When groundlessness and/or lawlessness is found the damages owed by the guilty employer shall include :

- the indexed, increased and updated wages, management allowance included;
- when adjustments and increments do not cover the entire inflation rate, then the equivalent of wage rights will be brought up to its level. In case adjustments and increments were not paid the equivalent will take into consideration the entire rate of inflation;
- benefits for special work conditions. However, they may be included in the amount of damages solely for the respite when there has been actual work activity within such work conditions<sup>8</sup>;
- equivalent value of meal tickets<sup>9</sup>;

<sup>6</sup> Decision no. 318/2007 published in Romania’s Official Monitor, Part I., no.292 of May 3rd 2007

<sup>7</sup> L.Dima, in Al.Athanasiu, Mo.Volonciu, L.Dima, O.Cazan, Codul muncii.Comentariu pe articole. Vol.I.Articles 1-107, Ed.C.H.Beck, Bucuresti, 2007, p.78 (further quoted Codul muncii.Comentariu...)

<sup>8</sup> I.T.Ştefănescu, op.cit., p.444

<sup>9</sup> Court of Appeal Braşov, Civil ruling no.107 of April 12 ,2007, in Curtea de Apel Braşov, Culegere de practică judiciară în materie civilă pe anul 2006, Ed. „Hamangiu”, Bucureşti, 2007, p.170

- to the sum of damages and the due interest is to be added as the patrimonial responsibility of the employer is founded on the contractual civil responsibility. The employer can be compelled to pay penalties instead of interests<sup>10</sup>;  
 - payment of moral compensations.

The respite for which compensations are granted is considered differing as to the instance whether the employee has asked for job reinstatement or not<sup>11</sup>.

In case when the appellant has asked for compensations, as well as for reinstatement (*restitutio in integrum*) the amount of it is calculated beginning on the day of dismissal up to the effective reinstatement.

When only compensation is asked for, without an expressed demand for reinstatement, then the calculation will have in view the lapse of time between the date of dismissal and the date of annulment of the dismissal decision<sup>12</sup>.

The prevailing judiciary practice has it that granting compensation should not be conditioned by the fact that the unfairly dismissed person has or has not insisted on being reinstated by a different employer<sup>13</sup>. However, the doctrine has issued the opinion that “in such cases, in certain circumstances—of belated reinstatement, not at all justified—one might say, in one way or other, that the issue of legal abuse committed by the dismissed individual<sup>14</sup> might be raised.

In case the court is being referred to an appeal against the disciplinary dismissal decision and it proceeds to replacing the action by an milder one, then it is being considered that the employee is entitled to partial compensation and not to entire one<sup>15</sup>.

Par.2 of art.78 in Employment/Labour Code has generated controversy in the legal literature as well as practical difficulties linked to the reinstatement of the employee. The text in question does not use the term *reinstatement* but *restoring the parties to the previous state* extant before the act of dismissal has been issued. There has been expressed the opinion that the solution adopted by the lawmaker is justified starting out from the following considerations<sup>16</sup> :

- nullity of dismissal decision has the effect of restoring the parties to the previous state and not reinstatement of the employee in the function detained anteriorly ;
- there may come up situations when reinstatement becomes impossible ;
- more often than not, following dismissal, the rapport between employer and employee turns into being so much deteriorated that they do not wish to resume their previous work relation anymore.

<sup>10</sup> S.Beligrădeanu, I.T.Stefănescu, Corecta interpretare a art.78 din Codul muncii privitor la sancționarea concedierilor netemeinice ori nelegale, în „Dreptul”, nr.5/2009,p.65

<sup>11</sup> Al. Țiclea, op.cit., p.674

<sup>12</sup> Court of Appeal Cluj, Civil section for employment,social security for underaged and family Decision no.156/R/2008; Court of Appeal București, 7th civil section, work conflicts and social security, Civil decision no. 2634/R of Sept. 27,2006, in L.Uță, F.Rotaru, S.Cristescu, Codul muncii adnotat .Vol.I Art.1 - 153.Legislație.Jurisprudență națională și comunitară.Doctrină și comentarii, Ed. “Hamangiu”, 2009, p.539 (further quoted in Codul muncii adnotat. . .)

<sup>13</sup> Court of Appeal Ploiești, Decision no.2886/1998, in I.T.Stefănescu, op.cit.,p. 445;

<sup>14</sup> I.T.Stefănescu, op.cit.,p. 445

<sup>15</sup> Al.Țiclea, op.cit.,p. 674

<sup>16</sup> L.Dima in Codul muncii.Comentariu. . .,p.414

It is beyond any doubt that the principle of *restitutio in integrum* in the Common Law, in case of the annulment of the dismissal has the effect of restoring the parties to the previous state only after an express requirement from the appellant's part. The appellant employee right in the object of his suing form has to notify the court his demand regarding reinstatement.

The reinstatement demand may take place, at the latest, till the last day of the presentation, under the sanction of revocation from the right to invoke the provisions art.78 par.2 in Employment Code. The bench of the first court has the obligation to exercise its active part starting right from the first summons, in order to avoid revocation by drawing the attention of the appellant to state his/her point-of-view regarding reinstatement<sup>17</sup>.

When through this suing form the claimant asks for reinstatement, the court cannot analyse the opportunity of such petitory action when finding that the contested decision is null ; thus being compelled to reinstate the parties to the situation prior to the issue of dismissal decision. It is to be mentioned that not in all legal systems in the world reinstatement is compulsory following the repeal of dismissal decision by the authority of employment jurisdiction. In some countries there is the opinion that once one is dismissed, unfairly or not, the relationship between employee and employer has deteriorated beyond repair and a compelling reinstatement would trigger tense work climate, with legal parties touched by grudge, which would, more or less, later, create situations of conflict that might touch the natural exercise of contractual tasks within the legal working rapports involved. The bulk of the European law systems converge towards the conclusion that reinstatement should solely decide in situations of exception. However, there are law systems in which the court may deny the demand for reinstatement if it finds that there has been thorough and insurmountable breach between the parties with the possibility of granting additional compensations<sup>18</sup>.

There still is a practical problem namely that of knowing whether the employee who has been granted reinstatement by a court may opt for returning to his/her work place or give it up altogether. The answer to this problem should start from the certitude that the court's ruling once communicated does not allow for the parties to ignore its content. Such a thing means that the employer must—at least theoretically—must not take any steps to stop the employee to take back the previously detained job ; however, the employee—for a change—has to report back to it. If the latter does not comply then he or she are taking the risk that the employer starts a disciplinary procedure of firing them for absence without leave. Obviously enough, nothing can prevent the parties involves from striking an agreement as to the fact that the employee does not continue activity with the former employer. In such case the employer will reinstate the claiming employee, thus complying with the provisions of art.278 in Employment Code ; following this, the parties, in full agreement, will pas on to the termination of the employment contract by virtue of art.55 let. b in the same Code.

The text of art.78 par. 2 in Employment Code is valued by some doctrinarians useless or, at most needy and against regulations that have in view the effects of the nullity of a legal document<sup>19</sup>.

<sup>17</sup> S.Beligrădeanu, I.T.Stefănescu op.cit.,p.67 - 68

<sup>18</sup> I.T.Stefănescu, op.cit.,p.446, nota 2

<sup>19</sup> Al.Țiclea, Discuții privind reintegrarea în muncă drept efect al anulării măsurii concedierii dispuse de angajator, in „Dreptul”, no.12/2008, p.58; Al.Țiclea, Tratat de dreptul muncii, ediția a IV-a, Ed. „Universul Juridic”, București, 2010, p.675

This point-of-view is not shared by other writers being considered that “were it not such a continuity, by virtue of art.78 par.2 in Employment Code the dismissed employee’s renunciation to reinstatement would have not been admissible as it is in glaring contradiction with art.38 in the very same Code”<sup>20</sup>. The very same writers—whose opinion we also share entirely—acquiesce in the idea expressed in the doctrine that the wording of art.78 par.2 would have been normal and cogent were it in the other way around, i.e., bringing back the parties to original state (reinstatement of unfairly- and/or illegally dismissed employee) , to act *ope legis*, the same way as the granting of compensations, with the exception of the case when the redundant one gives up, expressly and unequivocally his/her reinstatement<sup>21</sup>. Such renunciation in case of cancellation of dismissal would justify the termination of employment contract by resignation, i.e., *via* the one-sided act of the appellatant employee.

In the actual legislative configuration if the employee-claimant has won the litigation and obtained cancellation of the dismissal decision and has not asked for reinstatement as well, on the date of the irrevocable court ruling, there only remains the assumption that the employee resigns unilaterally.

Legal practice has found itself facing a series of situations whose solution is either lacking from legislation or it is equivocal thus creating reinstatement difficulties.

Consequently, one first problem is that of *the appointed date of reinstatement* as practice has it that time and again return to the former job is rather difficult due either to the employer’s passiveness—or even his/her reluctance to comply with the court’s ruling, or even due to the employee’s negligence or illmeaning.

As law is rather silent on the field of resuming activity following ordering of reinstatement, the addition of the following various solutions have been suggested:

1. Starting from the corroborated interpretation of arts. 277-279 in Employment Code, there has been launched the hypothesis that the employee should return to the previous work place within 15 days from the adaptation of the court’s ruling.

This point-of-view is considered erroneous as art. 277 in Employment Code envisages a respite of 15 days regarding the payment of wages and does not refer to complying with the court’s ruling on reinstatement. Art 278 in Employment Code, relevant to the analysed situation, has no provisions for the term concerning the implementation of the reinstatement demand<sup>22</sup>.

2. By calling upon the text or art.289 in Employment Code one arrives to the conclusion that the date of court-ruling will actually determine the time of reinstatement as well. Hence, the employee will have to diligently act by addressing the employer immediately the favourable court’s ruling has been brought to his knowledge. On the other hand, the employer will have to act in good faith by implementing the said ruling without waiting for enforcement<sup>23</sup>.

To our judgement, this latter solution is nice and interesting from theoretical point-of-view but it is wrong in that it lacks certain sure and and precise terms. Imprecision and

<sup>20</sup> S.Beligrădeanu, I.T.Stefănescu, op.cit.,p.81

<sup>21</sup> Al.Țiclea op.cit., p.675

<sup>22</sup> I.T.Stefănescu op.cit.p.446 -447

<sup>23</sup> Al.Țiclea, op.cit., p.679

ambiguity are being caused by the lawmaker's negligence who has not vouchsafed –not even after so much signaling from the part of the legal practice and doctrine—to fill the gap in this matter. As a matter of fact, the author of this latter solution has made references to drawbacks popped up in practice created mainly by employers harassing the appellant of reinstatement by taking advantage (committing even legal abuses) of the ambiguity of the law, such as :

- the employer, in spite of having been part in work litigation, denies the employee's reinstatement before the latter produces the outwritten sentence. However, it is widely known that between the pronouncement of the sentence and its being written out, and its being communicated to the other party, there is a rather long lapse of time that creates uncertainty to both parties, detrimental to either.

- denial of reinstatement in spite of the court's ruling by invoking the expectancy of the ruling in appeal. Moreover, not even after the ruling in appeal reinstatement is implemented, as the decision of the judiciary control court is required *in extenso*<sup>24</sup>. Procrastination or denial of reinstatement as such may have for consequence the penal liability of the guilty one as well the implication of the Romanian state as liable for failing to take the necessary measures required by the implementation of a court ruling. In more than one case against Romania the European Court of Human Rights found that due to the passivity or needy industry of the Romanian authorities the provisions of art.6 in the European Convention of Human Rights have been trespassed, thus inflicting both moral- and material prejudice upon the petitioners<sup>25</sup>.

3. Thus, it is being proposed the introduction in the Employment Code of a text stipulating that the implementation of a court's ruling of compensation payment and (in case of need) reinstatement as well to be lost by prescription unless expressly demanded, within not less than 6 months from the date of the final ruling of Employment Court jurisdiction<sup>26</sup>.

We consider as much thoughtful the proposal of *lege ferenda* to curtail prescription term; however, to our mind, the one suggested for 6 months seems to us rather long ; thus, the 15 –day term stipulated by art. 277 of Employment/Labour Code can be translated to situations regarding reinstatement and payment of damages/compensations as well.

4. Practice has also situations when the employer—though he/she does not apply to dismissal perfunctorily, *de facto* they send the employee away, not accepting his/her presence at work place. In such a situation it is being suggested—as sole solution—to sue the employer and make him/her pay compensations and reinstate the employee implied<sup>27</sup>.

Doctrine's endeavour of finding solutions is utterly laudable ; however, these are often either controversial or impracticable, reason why, we think, it is imperious the introduction—the sooner the better—of a legal settlement stipulating a not too long term of reinstatement (something of the sort of 3-year prescription) also establishing the moment of elapsing from the datum of the final ruling of the employment jurisdictional court.

<sup>24</sup> Ibidem

<sup>25</sup> Al. Țiclea, Reintegrarea în muncă – efect al anulării concedierii – potrivit jurisprudenței Curții Europene a Drepturilor Omului, în R.R.D.M. nr.6/2008; Al.Țiclea, Discuții privind reintegrarea în muncă drept efect al anulării măsurii concedierii dispuse de angajator, in „Dreptul”, nr.12/2008;

<sup>26</sup> S.Beligirădeanu, I.T.Stefănescu, op.cit., p.82

Another problem controversial in practice is that of issuing a *decision of reinstatement* from the employer's part, as a likely necessity. Romanian Employment Law has no provisions to this effect whatsoever ; however, contradictory solutions have shown up in legal practice.

Thus, with a case solved by one court it was stated that "in implementing a civil sentence ruling the cancellation of employment contract of the employee and his/her reinstatement to the job detained prior to the decision of dismissal being issued, the employer—party to the individual employment contract—has the obligation to issue a document of effective reinstatement of the employee to the job the employee used to detain prior to the issuing the dismissal decision, to be communicated to the other party as well. Thus, the employee had the obligation to show up at work place and resume activity within the implementation of his/her individual employment contract, only after the employing organisation has handed the administrative document expressing the disposition of reinstatement to the previously detained position, i.e., before dismissal"<sup>28</sup>.

To our mind, the ruling of the court mentioned before is wrong in that it compels futile additional obligations leading to only procrastination of the employee's reinstatement, and who has actually won the litigation. The implementation of a final and irrevocable court ruling is in need of no administrative document issued by the employer as this one has the obligation to obey the court ruling to the dot and this can be altered or annulled solely by exercise of legal ways of denying it as the ruling should be pure and simple, i.e., be carried out precisely and not *via* limitations or constraints<sup>29</sup>.

With another case, solved by another court, it has been established that it is not necessary to issue a new decision of the employer assessing the employee's reinstatement to the previously detained position. The court's motivation—qualified correct by us as well—is that in such situation there intervenes the employment authority by pronouncing the ruling that orders reinstatement because, on solving the appeal, the problem has been irrevocably settled once for all and the employer must obey precisely by reinstating the employee in accordance with the wording and spirit of the enforceable decision<sup>30</sup>.

Another question in searching for an answer in practice is *which position does the reinstatement concern?*

According to the Romanian Labour Law reinstatement has to be effective and in the post or function detained anteriorly and by no means in an alternative one be it similar and corresponding to the employee's schooling. Text argumentations lean against art.78 par.2 and art.41 par. 1 & 3 Employment Code. In art.78 par. 2 in it imposes the party's reinstatement to the state previous to dismissal and, the text of art.41 invoked hints at the rule of unaltered employment contract save the common accord of the parties and the expressed limiting conditions stipulated by the law. Conversely, a "reinstatement" on another position would mean an one-sided alteration of the individual employment contract, forbidden by the law, save the provisions for situations made by the law.

<sup>27</sup> I.T.Stefănescu, op.cit., p.447

<sup>28</sup> L.Uță, F.Rotaru, S.Cristescu, Codul muncii adnotat. . .p. 78

<sup>29</sup> Al.Țiclea, op.cit., p.680

<sup>30</sup> Court of Appeal Pitești, civil section and for causes regarding work conflicts and social security, for underaged- and family causes , Decizia no.99/R-CM/2007, in Al.Țiclea, op.cit., p.680



Judiciary doctrine and practice have brought situations somewhat special to light that might come up with reinstatement; of these, we display the following as examples :

1. *The post in question has been taken by another employee.* If reinstatement is ruled then the employment contract of the new employee will rightfully cease (art.56 par. f in Employment Code/Labour Code) and the claiming employee will be restored to the position detained prior to his/her dismissal.

2. *The post has been abolished.* Such situation allows for several solutions:

a) the employee's reassignment to a vacant position equivalent to the one detained prior to dismissal will be attempted. The Employment Code/Labour ~ does not carry any specification regarding the term equivalent ; the doctrine however has launched the opinion that equivalence presumes :

- identical-or similar, professional qualification (certified through specialised studies);
- similar job duties and responsibilities ;
- wages at least equalling the previous ones<sup>31</sup>.

European Court of Human Rights has established in the case *Ștefănescu versus România* that the ulterior abolition of the post (after the pronouncement of the irrevocable solution of the cancellation of dismissal) does not exonerate the other party from the obligation of reinstatement in a position equivalent that detained previously. To this Court's mind, restoration to an equivalent position, as well as payment of the updated material- and moral compensations might lead to a situation of equivalence to that anterior to the illegal and unfair measure. The authorities have the obligation to do everything within their power to implement a court's ruling—otherwise they engage the Romanian state's liability for infringement of art.6 in European Convention of Human Rights<sup>32</sup>.

b) a post will be made vacant (as far as possible ) under art.56 par. f in Labour Code;

c) In case of a challenged dismissal based on illegality and groundlessness, before the time of reinstatement to the previous situation the post has been abolished due to a real and serious cause , the question of reinstatement being possible or not still stands. One first answer sustains that reinstatement should take place on the staff and after the employee's reemployment on the abolished position a new dismissal will take place under art.65 in Labour Code<sup>33</sup>. A second opinion –and we readily adhere to it—says that one cannot recur to a real dismissal having a serious cause as thus it is being created an impossible situation of reinstatement, regardless that the abolishment was individual or caused by a collective redundancy “being elementary that an employee—illegally/unfairly dismissed before—cannot have several rights (in case that art.65 in Labour Code is implemented) solely when such dismissal would not have taken place”<sup>34</sup>. Doctrine also has it that such a situation builds up a state of impossibility of carrying out the obligation of reinstatement in accordance with the Roman conception i.e., *impossibilium nulla obligatio est*. Therefore, “as the effective enforcement of the obligation itself has become impossible—that leads to the nullity of the obligation itself—hypothetically it cannot be enforced be it only virtually and for a single moment”<sup>35</sup>.

<sup>31</sup> Al.Țiclea op.cit., p.681

<sup>32</sup> Ibidem; for details and comments regarding the international protection of human rights, see C.Bîrsan, Convenția europeană a drepturilor omului.Comentariu pe articole.Vol.I.Drepturi și libertăți, Ed. „C.H.Beck”, București, 2005

<sup>33</sup> Al.Țiclea,op.cit.,p.682-683.

<sup>34</sup> S.Beligrădeanu, I.T.Stefănescu op.cit., p.75

<sup>35</sup> I.T.Stefănescu, op.cit., p.450-451

It is utterly estimated that in spite of the fact that neither the Labour Code nor Act no. 168/1999 have expressed provisions that the Employment Court notified by the employer before ruling the abolition of the position involved, on solving the case, beside examination of the legality / ground of the dismissal decision, must also decide upon the following sides:<sup>36</sup>

- to check whether the employer's allegations correspond to reality ;
- to grant compensations solely in case of legal discontinuance or dismissal ;
- to ascertain the termination of the employment contract on the date (before reference) when a ground different from the initial one has come up ;
- in case a dismissal situation under art.65 in Labour Code comes up to refer the termination of the employment contract on the date when this ground has shown up.

3. *Before the reference of the reinstatement decision the employee has found another employment.* In such situation reinstatement is absolutely possible as, under the provisions of art.35 in Labour Code, any employee has the right to cumulate several jobs based on individual employment contracts. However, there might come up certain drawback falling to the cumulating employee when the work programmes with the two employers overlap, either entirely or partially. In such case, the employee must decide either for one of the employers, or the other ; otherwise, he/she is liable on disciplinary grounds, i.e., dismissal.

4. *Appearance of a legal-and incompatibility case.* Such hypotheses will objectively lead to the impossibility of reinstatement in activity as they are the aftermath of some legal norms that cannot be broken by the employer's will.

5. *Cases of reorganising-or selling of the employing units.* Reorganising by division, absorption or merger cause the organisation who has formally taken over the schedule of/member functions, to reinstate the employers who detained the respective positions before and they, in expressed manner-or tacitly, implied their wish to continue activity.

In case of enterprise conveyance, national legislation has to be compatible with Directive no. 2021/23/CE of the Council, of March 12, 2001 regarding the commandation of the member-states' acqui referring to maintaining the workers' rights in case of conveyance of enterprises, units or parts of enterprises or units.

Under art.1 the present Directive is applied in case of any conveyance, unit or part of enterprise or part of unit towards another employer, as result of a conventional cession or merger.

Grantor's rights and duties-under art.3 of the same Directive-ensuing from an employment contract or working rapport extant at the date of the conveyance, in case of such conveyance, these are conveyed to the grantee. After conveyance the grantee is compelled to maintain the convened work conditions in a collective agreement, within the same conditions applicable to the grantor within the same agreement, until the date of cancellation or deadline of the collective agreement, or date of enforcing or application of another collective agreement.

The Directive settles in the contents of art.4 that the conveyance of an enterprise, unit or part of enterprise or unit does not constitute in itself a ground for dismissal for the

<sup>36</sup> S.Beligrădeanu, I.T.Stefănescu, op.cit., p.73-74; I.T.Stefănescu, op.cit., p.451

grantor or the grantee. This disposition does not impede layoffs that can possibly intervene out of sheer economic-, technic- or organisational grounds triggering alterations regarding those within the work force.

From the practice of the Court of Justice of the European Community there obviously results that all contracts of work rapports extant between grantor and employees of the enterprise on conveyance date are conveyed entirely right to the grantee *via* the sheer fact of conveyance<sup>37</sup>. In Romania, Law no. 67/2006 regarding the protection of employees' rights in case of conveyance has been adopted ; under this bill, the new owner of the employing organisation is compelled to reinstate the employee<sup>38</sup>.

On finishing the present essay it is allowed to us to end it in certitude that the dispositions of Labour Code—to be more sure—of art.78 pars.1 & 2 are perfectible and not useless. The way the aforementioned text is worded is incapable of answering a series of questions thus being the cause of serious difficulties in the legal practice.

We are confident that, along the writers already mentioned, it is imperiously necessary that the text talked about should be altered and made up both in what compelling the court is concerned and when it finds *pendente lite* the intervention of another cause for terminating the employment contract. Also, to carry out a thorough investigation on the ways the legal conditions regarding reinstatement and callulation of material-and moral damages were implemented<sup>39</sup>.

We entirely agree with the proposal that the tackling of the problems of reinstatement dictates the necessity of a more flexible settlement allowing the courts to also order reinstatement in positions or equivalent functions, too, so as these correspond to the schooling of the involved individual, to attributions and tasks had before dismissal, whenever the post ceased to exist or it is not anymore vacant. However, we think that there should prevail the obligation of reinstatement in the same post whenever it still exists and it is vacant. In so far as the opportunity of offering the same post, or of an equivalent one, we consider that it should stay with the reinstating employer, with the exception of the cases allowing for the proof that an abuse of rights has been committed , which in itself is already submitted to censoring from the part of a court.

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<sup>37</sup> Codul european al muncii și securității sociale, edition in care of Costel Gâlcă, Ed. „Wolters Kluwer”, București, 2009, p.177-188

<sup>38</sup> M.Of. nr.276 din 28 martie 2006

<sup>39</sup> For details regarding suggestions for lege ferenda, see Al.Țiclea, Discuții privind reintegrarea în muncă drept efect al anulării măsurii concedierii dispuse de angajator, in „Dreptul” nr.12/2008, p.64; Al.Țiclea, Tratat de dreptul muncii, 4th edition Ed. „Universul Juridic”, București, 2010, p.672-684; S.Beligrădeanu, I.T.Stefănescu, op.cit., p. 80-82.