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PRACTICAL CONSIDERATIONS ON INDIVIDUAL DISMISSAL UNDER ART. 65 OF THE ROMANIAN LABOUR CODE AND THE PROTECTION OF THE EMPLOYEES RIGHTS

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ABSTRACT: *Dismissal is a form of employment termination at the employer's initiative. The lawmaker regulated several scenarios where the employer may terminate an employee. Considering the legal effects arising from termination, the lawmaker established the procedure to be followed by the employer in order to issue a lawful and just termination decision under some compulsory regulations.*
The dismissal regulated by art. 65 of the Labour Code covers those situations when the employer terminates the position filled by the employee due to objective circumstances, as a rule of economic or technical nature. Please note that in this case the employee is not in default, and the reasons which lead to termination are objective and independent from the employee's conduct in performing his/her job duties.

KEYWORDS: *dismissal, employer, employee, economic reasons, real and serious reasons, objective reasons, termination of employment*
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1. GENERAL

Starting a business is usually fuelled by the desire to yield profit. A healthy business cannot survive only with a managerial team formed by specialists, but also needs productive workforce. Depending on the progress of the technical industry and the ever-changing needs of the population, a business undergoes permanent changes. These changes can affect the business activity, the departmental structure, new production lines, or even technical and employee downsizing. Such changes can also be driven by the emergence of new actors on the target market, translating as changes caused by market competition. Therefore, there may be situations when a business needs to downsize. For

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example, this is the case with the dissolution of production units or staff reduction in a certain department. As a rule, this type of staff reduction is called "restructuring" and can target a significant number of employees, as in the case of collective layoffs, or a reduced number of employees, as in the case of individual dismissals. Art. 68 of the Labour Code sets forth a series of criteria (Labour Code, 2015) to help us determine whether it is a matter of collective layoffs. If the criteria are not met, the layoff is individual and falls under the incidence of art. 65 of the Labour Code.

Dismissal is defined in art. 58, paragraph 1 of the Labour Code as termination of the individual employment contract at the initiative of the employer. The employer may instruct such dismissal for reasons related to or unrelated to the employee.

The dismissal for reasons unrelated to the employee is regulated under art. 65 of the Labour Code. In its initial form, art. 65 listed the reasons which could lead to the termination of a position, such as: economic hardships, technological changes and business reorganisation. The Emergency Government Ordinance no. 55/2006 amended the content of art. 65 of the Labour Code, which currently stipulates that this type of layoff represents the termination of employment as a result of terminating the position held by the employee, from one or several reasons unrelated to the employee. *The termination of the position must be factual and caused by real and serious reasons.* So the dismissal must not be discretionary , it must follow a procedure and a number of requirements set out in the Labour Code in order to protect the fundamental rights of employees (Moroianu Zlatescu Irina, 2008).

2. CIRCUMSTANCES WHEN DISMISSAL UNDER ART. 65 OF THE LABOUR CODE CAN BE INSTRUCTED

The conditions to be met simultaneously so that the employer's termination decision is lawful and just are set forth in art. 65, paragraph (2). However, the termination of the position must *be factual and caused by real and serious reasons.* Please note that the lawmaker did not define the terms "factual termination" or "real and serious reasons", the content of which is dictated by the doctrine and case law:

1) *the factual nature of employment termination* (or position/job termination) (Ticlea Al., 2013, pp. 98-99; pp. 99-100; pp. 100-102; pp. 102-103; pp. 103-106; pp. 131-132) (Uţă L., Rotaru F., Cristescu S., 2009, pp.111-114; pp. 170-172; pp. 210-216) means that the employment/position/job in question was deleted from the company's job title list and from the organisational chart. Such termination should be based on the decision of the employer's relevant management body (Gilca, Costel, 2008 p. 236), (Uţă L., Rotaru F., Cristescu S., 2013, pp. 144-145; pp. 165-171; pp. 124-132; pp. 124-132). It is unlawful to alter an employee's status outside the prior decision of the management body, which makes the termination of employment unlawful. Depending on the employer's charter, the management body can be the general meeting of shareholders, the supervisory board, the board of directors, the sole shareholder or other bodies which according to the employer's status as body corporate/private individual are vested with decision-making powers in relation to the job title list (Uta L., Rotaru F., Cristescu R., 2013 pp. 144-151);

2) *the decision made by the employer should have a real and serious cause* (Ticlea Al., 2013 pp. 94-96; pp. 97-98; pp.107-108; pp. 115-119; pp. 122-124) (Uta L., Rotaru F., Cristescu R., 2013 pp. 132-137; pp. 151-156; pp. 156-165). Professor Ion-Traian

Ştefănescu details the term in one of his articles (Stefanescu Ion Traian, 2005) for a cause to be real and serious, the following conditions should be met:

a) it should be *objective.* By objectivity we understand that the reasons which compel the termination of a position are completely unrelated to the employee, to how the employee is perceived in the workplace, to the peers' opinion about him/her and to possible conflicts among employees which are unrelated to the work relations; in other words, "the reason should be independent from any subjective factors, any possible preferences or whims of the employer" (Stefanescu Ion Traian, 2005);

b) it should be *precise (accurate),* "it should be the actual cause for termination, not dissimulate another reason (such as the desire to dismiss a certain employee at any cost), formally claiming that the termination was based on one or several reasons unrelated to the employee" (Stefanescu Ion Traian, 2005);

c) to be *serious,* "meaning that the reasons unrelated to the employee should weigh heavily and actually compel the termination of a position or several positions". Therefore, there must exist a balanced ratio between cause and effect.

The above requirement brings forth a two-way analysis:

- the first perspective, employer-oriented: it determines whether the reasons unrelated to the employee are likely to trigger the employer's legitimate interest to terminate the employment (employment contracts);
- the second perspective, employee-oriented: it determines whether, facing unemployment, dismissal is indeed the last possible option, also considering the personal situation of the employee in question (age, difficulty of professional reconversion, family status, etc.)" (Stefanescu Ion Traian, 2005).

The case law and doctrine list the following situations circumscribed to the notion of real cause, without limitation thereto (Tinca Ov., 2005):

- business reorganisation;
- relocation of the business unit to another city;
- termination of the position as a result of losing the employer's only customer;
- dissolution of the employer's organisation;
- economic hardships. This situation should be substantiated by financial and accounting records. The employer must produce proof of such circumstanced (Tinca Ov., 2005).

An ever more frequent real-life situation which leads to individual dismissals is the existence of economic hardships.

The analysis of the current economic background in the European Single Market and in Romania, as well as of the Country Report for Romania -2015 (European Commission-Country Report Romania 2015 - Including an In-Depth Review on the Prevention and Correction of Macroeconomic Imbalances, 2015) allows us to extend the hypothesis according to which dismissals for economic reasons shall increase in the near future. The underlying cause is obvious if we consider the structural changes of the economy. Such changes reflect, in fact, the new paradigm anticipated by the task force appointed by the European Commission to analyse the predictions regarding the development of the production sector. More precisely, it anticipates that "a new paradigm is under way, featuring two complementary components:

1. emergence of a global sustainable manufacturing network, comprising global industries with production sites located in countries with competitive advantages (tax, manpower cost, etc.)

2. development of local sustainable manufacturing sites, with focus on local production, in particular where the proximity between the manufacturer and the end consumer is of the essence" (European Commission, 2014)

However, this information should be interpreted in the context of the 2020 Europe Strategy (The European Commission- Communication General Directorate, 2015), whereby the European Commission commits to support the development of the social economy, in general, and of the social organisations, in particular. Their chief goal is not mainly to obtain profit, but rather to defend the interests of the community by addressing its social and environmental objectives.

The context described above is specific to the macroclimate in which organisations operate. The analysis of the circumstances in which dismissals on economic grounds take place requires the corroboration of this information with matters related to the microclimate of the organisation under survey. In other words, consideration should be given to the fact that these reasons should be interpreted in relation with the documented economic reality and economic context of the organization at the time of the termination decision. Such an approach is necessary since economic concepts launched approximately 30 years ago, whose transposition into practice was equivalent at the time with a source of competitive advantage, are today the norm. We will mention here only two of these concepts, relevant for our analysis, namely: the organisation as open system (W.R., 1981) and the competition between networks of organisations which contribute to the creation of value, and not between individual organisations (Christopher, 1992). As a direct consequence, the economic hardships of an organisation are projected onto another organisation – leading to the snowball effect.

The understanding and documentation of these economic issues in the event of dismissal on economic grounds are of the essence.

It is critical to point out that art. 65 of the Labour Code provides *sine qua non* that a termination of the position(s) should always take place. "It does not suffice, for example, to introduce some technological changes; these should imply or allow (in the employer's interest) the termination of certain positions, termination which must take place in truth. The key condition for the application of art. 65 is that, while the employer has a real and serious cause – in all the cases – one or several positions must be terminated. In conclusion, the dismissal for reasons unrelated to the employee cannot happen anytime and anywhere; it needs a prerequisite, which is lawful and restrictive – the termination of the position" (Tinca Ov., 2005).

In our opinion the causes which lead to the measure set forth by art. 65 of the Labour Code should have a *factual nature*. As such, the mere existence of a potential fall in the income or business does not justify this decision. Consequently the real and serious nature of the measure should be determined by the current and actual situation and not by a possible, uncertain and hypothetical situation.

In the practice of law courts it is constantly pointed out that "to the extent that both prior and after the termination decision the company hired, the financial reason which determines the company's cost reduction, including staff reduction, *does not appear as real and serious.* Downsizing cannot be a mere pretext for the removal of an employee;

consequently the termination of his/her employment contract, followed by the employment of other individuals from outside the company, regardless in what position, is unacceptable; in these circumstances, the reorganisation is not real. The situation in which the company hires, while claiming to be under reorganisation, is sufficient to prove the unlawfulness of the dismissal" (Uţă L., Rotaru F., Cristescu S., 2009, p.122).

The entire relevant doctrine and case law have established repeatedly that the only person able to determine the *opportunity* (Uta L., Rotaru F., Cristescu R., 2013, pp. 144-145) *(*"*It is the employer's prerogative to establish the job title list,* the positions to be terminated as a result of a changing vision in business organisation, of a managerial vision driven by *opportunity* or even only by the desire to carry on the activity under another form, and the role of the court is not to censure the company's right to organise its activity, to terminate positions which in its opinion are not lucrative, and possibly to create new positions" in C. A. Bucharest, VII Civil Division, labour conflicts and social security, decision no. 3062/R/2010 (Uta L., Rotaru F., Cristescu R., 2013, pp.144-145; pp. 165-171; pp. 124-132)) of the termination of an employee's position on grounds of economic hardships, technological changes or business reorganisation, *is the employer (*"The employer enjoys an *appreciation margin* regarding the structure and management of its business, considering that maintaining a position in the job title list is not a compulsory requirement, and the organisation of the company's business so as to operate at the highest efficiency and productivity is exclusively the prerogative of the bodies through which the social will is expressed. The court cannot decide in the company's stead, that, considering the profit made or the costs reduced, a terminated position should be reopened, since economic efficiency entails not only the reduction of the actual expenses, but also improving the profit-cost ratio, as well as an in-depth projection of the long-term business of the respective company" in C. A. Bucharest, VII Civil Division, labour conflicts and social security, decision no. 3062/R/2010 (Uta L., Rotaru F., Cristescu R., 2013, pp. 144-145)). Moreover, the employer is the only one capable to determine whether the company faces economic hardships, needs technological changes or business reorganisation, as the employer will suffer the consequences if the steps taken do not lead to economic redress, while courts cannot censure this right (Comsa C.-G., 2010, pp. 204-213). In another case, the court pointed out that the employer has the managerial prerogative, being entitled to make the selection of the jobs to be terminated if it considers that such measure will boost the business activity. If in the reasonable opinion of the managing body the company's reorganisation also requires the termination of some positions, the court must consider this decision when it reviews the claim, lacking the competence to interfere with the design and implementation of the employer's reorganisation strategy (Uţă L., Rotaru F., Cristescu S., 2009, p. 139). "The labour court lacks the competence to assess the matters related to the economic efficiency or hardships suffered by the company" (Uţă L., Rotaru F., Cristescu S., 2009, p. 139).

3. FREQUENT ASSUMPTIONS AND ERRORS ENCOUNTERED IN LEGAL PRACTICE

A. Employers have frequently attempted to elude the conditions required by the law, in order to make the termination of employment appear as lawful.

Claiming economic hardships. We encounter many employers who, in a rush, will claim economic hardships, that the company incurs high costs with the human resources, utility services and suppliers. Before invoking all these reasons, a prudent employer acting in good faith should at a minimum: consult the financial-accounting records (balance sheet), the statement of cash inflow and outflow and the profit/loss of the previous year. If the company incurred profit, had a healthy cash flow, it possibly opened one or two offices, purchased one or two new vehicles, computers, PDAs and other equipment, it is clearly not in financial distress.

However, if the company is in financial distress, what could be done? In our opinion, in this case the employer should instruct the financial-accounting department to prepare a summary and a report regarding its current financial position, cash receipts, payments, current costs, a review of the previous year's profit. From all these documents it should result that the company is in the red and therefore the economic hardship is real.

B. In addition, the legal practice reveals cases when the employer terminates a position only formally. More precisely, although it appears that the employer terminates the position, *at the same time it opens another position under a different name.* During the trial of a case, the court found that the new organisational chart produced as evidence by the respondent revealed that once with the termination of the assistant manager position held by the claimant, the respondent created a new artistic manager position, later filled by another individual. The court appreciated that it was not in fact a matter of staff reduction, as claimed by the respondent, but simply of renaming the position filled by the claimant; this also results from the duties pertaining to the two positions, according to the *job description*, and from the subordinated departments (Ticlea, Al., 2011, p. 314) . In a nutshell, "secretary" is replaced by "administrative officer".

The link between the two jobs is the *job description.* According to the provisions of the Labour Code, the job description must be acknowledged by the employee prior to the beginning of employment. Although the Labour Code does not oblige the employer to give a copy of the job description to the employee (Labour Code, 2015), in practice, the fulfilment of this obligation is proved by the fact that the employer has handed a copy to the employee, while keeping the other copy of the signed and dated document in the employee file, with the mention that the employee was handed one copy. In our opinion, the job description has the legal status of a bilateral legal instrument, ancillary to the employment contract. As such, we define the job description as a bilateral legal instrument, ancillary to the employment contract which establishes the framework, scope and nature of the job performed by the employee. Therefore, we will compare the two positions not according to their official titles listed in the Classification of Occupations in Romania (C.O.R.) and stated in the individual employment contract, but according to the duties which have to be performed, also stated in the job description. Moreover, we consider that these duties can be proved even independently from the job description. As factual circumstances, they can be substantiated by any evidence, even witnesses.

C. Another possible situation is the *fictitious termination of the position and delegation of duties to another employee.* In this scenario it is difficult to prove the purely formal act of termination, in particular when the duties are not included in the job description of the employee who continues to perform them. However, the performance "of the new job duties" is factual, and can be substantiated by any evidence; also, it is not excluded that the employee who performs the duties confesses to the situation in court.

A question arising in the legal practice is whether in the event of termination under art. 65 of the Labour Code the employer has the obligation to offer the terminated employee another job, and to seek support of the territorial employment agency. Below we will attempt to provide a conclusive answer to this question.

According to art.64, paragraph (1) of the Labour Code, in the event that the termination occurs for the reasons set forth in art. 61 letters c) or d), and in the event that employment was legally terminated based on art. 56 paragraph (1), letter e), the employer has the obligation to propose to the employee other vacant positions available in the organisation, compatible with his/her professional background or, as appropriate, his/her fitness for work as determined by the occupational physician. If there are no vacant positions available in the organisation, the employer must seek the support of the territorial employment agency to redistribute the employee.

From the above, it is easy to remark that the dismissal scenario in accordance with art. 65 of the Labour Code is not provided. Nevertheless, in legal practice the question arose whether, in consideration of the general employment principles, these provisions should apply anyway in the circumstances described in art. 65.

The legal practice is not consistent as regards the employer's obligation to offer the employee another position in the circumstances of art. 64 of the Labour Code; some courts have consistently ruled the employer's obligation to propose other vacant positions, or otherwise to seek the support of the territorial employment agency, since employment relations should be founded on *the principle of good-faith and on the warranty of protection against unemployment* (Gilca, Costel, 2008, pp. 234-237). It is illogical that the situations described in art. 64 should require this procedure whereas the termination of employment for reasons unrelated to the employee should impose another procedure (Ticlea, Al., 2011, pp. 328-330) (Crisu C., 2011, p. 77). Moreover, case law revealed that art. 76, letter d) of the Labour Code establishes directly a formal condition, and indirectly a positive extrinsic condition, as a reference to art. 64, so as to avoid repeating its content, revealing the lawmaker's intention that the inclusion of the list of vacancies available in the unit should be compulsory in all cases of dismissal on grounds unrelated to the employee (C.A. Bucharest, 2013) (Bucharest County Court, 2013) both individual and collective.

In addition, the devoted literature pointed out that "the failure to state the length of the notice period and the list of jobs is not sanctioned with the reversal of the termination decision. The termination decision is not null and void if the employer proves compliance both with the conditions related to the notice period and with those related to another job offer, even if these elements were not set forth in the termination decision" (Ion Traian, Stefanescu, 2012, p. 454).

Conversely, some courts considered that the provisions of art. 64 and 76 letter d) are not applicable to dismissals under art. 65 of the Labour Code. In this opinion, the provisions of art. 64 and 76 are open to interpretation, and do not apply in the case of dismissal based on art. 65 of the Labour Code. "The requirements set forth by art. 74 paragraph (1) letter d) of the Labour Code (after republication of the Labour Code, art. 74 became art. 76, *author's note.*) that all the jobs available in the unit and the term within which employees could opt for a vacant position should be included in the termination decision, according to art. 64 of the Labour Code, is valid only in the case of dismissal for the employee's physical and mental unfitness, based on the provisions of art. 61 letter c),

for professional unsuitability based on art. 61 letter d), and in the case of lawful termination of employment in the situation prescribed by art. 56 letter f) of the Labour Code" (Uta, L., 2011). "As a case of individual dismissal and not collective layoff, the provisions relating to the communication of all the vacant positions available in the unit and the term within which employees could opt for one are not applicable" (Rotaru F., Cristescu S., 2011, p. 98).

According to this interpretation, the inclusion of the list of available positions and the option deadline in the termination decision applies only to the situation in which termination was instructed on the grounds set forth in art. 61 letters c) and d), and in case of collective layoffs (Uță L., Rotaru F., Cristescu S., 2009, p. 162).

Notwithstanding the above, we found the response given by the high Court of Cassation and Justice in a review for uniform application of the law surprising. By means of decision no. 6/2011 the High Court granted the review for uniform application of the law declared by the General Prosecutor of Romania and ruled: the provisions of art. 74 paragraph (1) letter d) (after re-publishing of the Labour Code, art. 74 became art. 76, *author's note*) of the Labour Code do not apply where the termination was instructed on grounds unrelated to the employee, based on art. 65 of the Labour Code.

In our opinion this was a wrongful decision; it is illogical to offer another position in the event of termination for physical and/or mental unfitness or professional unsuitability, or to seek the services of the employment agency, and not to act in the same manner in the event of termination for reasons unrelated to the employee. What is more, the decision of the High Court overlooks at least two fundamental principles of employment, i.e. *good-faith and the guarantee of the right to protection against unemployment.* In conclusion the court failed to keep the spirit of the law, not just the letter of the law.

D. Another frequent mistake is when the employer terminates the position and then notifies it to the regional employment agency as vacant due to termination of employment. It is nevertheless true that employers have the obligation to notify the regional employment agency about any vacant/newly created position, but in this situation it is not a matter of vacancy! The position has been deleted from the job title list. Consequently it cannot be communicated to the regional employment agency.

Should we discover that a vacancy has been mistakenly notified to the employment agency, we can send them a letter explaining that the position was communicated "by mistake".

The content of the termination decision is presented in art. 76 of the Labour Code.

Also, the legal practice is consistent in what regards the substantiation of the termination decision, regardless on what grounds. Therefore the mere repetition of the text of law as grounds does not provide a precise and actual substantiation, but only a theoretical and delusive one, purely abstract, which makes the decision null and void (Rotaru F., Cristescu S., 2011, pp. 92-98; pp. 98-104) (Uță L., Rotaru F., Cristescu S., 2009, pp. 227-229; pp. 201-203; pp. 210-216; pp. 220-223).

Finally, it is worth mentioning that the employer has the obligation to give 20 business days' notice. The proof of service is the termination notice handed to the employee. Of utmost importance is that the employee should note on a copy of the notice that he/she received one copy, the date of receipt, his/her name and signature. Should the employee refuse to receive the notice, it should be sent by registered mail with acknowledgment of receipt and declared content; why not, sometimes, for purposes of rigour and safety, the

employer may send the notice through the officer of the court, to have the guarantee of the record's content.

4. CONCLUSIONS AND PROPOSALS *OF LEX FERENDA*

In everyday life, dismissal is generally perceived as a sanction enforced by the employer against the employee. This conception persists especially due to the insufficient knowledge of the Labour Code and failure to differentiate between the various legal causes for termination.

In art. 65 of the Labour Code, the lawmaker regulated the situation where the legal employment relationship terminates at the employer's initiative, and not because the employee is in default in performing his/her obligations under the individual employment contract.

As already stated, the regulation provided in art. 65 of the Labour Code is not without criticism. Firstly, the interpretation given by the High Court in the review for uniform interpretation of the law seems misguided, since it fails to observe the spirit of the Labour Code regulation. In our opinion the review carried out by the High Court was purely formal and overlooked at least two fundamental principles of employment, i.e. *good-faith and the guarantee of the right to protection against unemployment.*

From our point of view the employer should be under the obligation to offer another position to the employee, to the extent that such position, compatible with the employee's professional background, exists in the unit. With a view to the *lex ferenda*, we propose the amendment of art. 64 so that the text of the law expressly stipulates the employer's obligation to offer the employee the opportunity to fill another position also in the event of termination under art. 65 of the Labour Code. As such, we propose the amendment of art. 64 of the Labour Code as follows: In the event that termination is instructed for the reasons set forth in art. 61 letters c) and d), ***art. 65***, as well as in the event that employment was lawfully terminated based on art. 56 paragraph (1) letter e), the employer has the obligation to propose another vacant position to the employee, befitting his/her professional background or, as appropriate, his/her fitness for work established by the occupational physician.

We leave for further discussions the need to select some principle criteria to be considered by the employer when terminating an employee based on art. 65 when, for example, there are several positions of the same type in the company. This scenario can occur when the employer has several cashier, commercial worker, sales agent, teaching positions. A legitimate question arises in this case: based on what criteria will the employer choose the position to be terminated and as a result terminate the employment contract of a certain employee? In our opinion, such situations need some reasonable criteria in order to avoid random dismissals. For example we can recommend: the employee's length of service, professional qualification, social and family status, conduct, term until retirement, possible certifications, professional distinctions. Other additional criteria may be laid down by the organisation's collective bargaining agreement, but we believe that at least the above criteria should be considered.

Finally, we must remember that the International Covenant on Economic, Social and Cultural Rights from 1966 recognizes the right to work, which includes the right of

everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.

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