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CONTROVERSIAL ASPECTS IN CASE LAW CONCERNING THE INDIVIDUAL LABOR DISPUTES

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ABSTRACT: *The individual labor dispute has as its object the exercise of certain rights or the fulfillment of obligations arising from individual and collective labor contracts or from collective agreements and employment relationships of civil servants, as well as from laws or other normative acts. The present study aims to analyze some controversial situations in judicial case law in the field of individual labor disputes, some of them generated by Constitutional Court Decisions or preliminary judgments on certain legal issues.*

KEYWORDS: *individual labor dispute; absolute nullity; suspension; unconstitutionality; indemnity*
JEL Classification: *K 31*

1. INTRODUCTIVE CONSIDERATIONS

The employee's dismissal decision[1] must comply with a number of requirements under the law regarding its content. Thus, the dismissal decision is communicated to the employee in writing and must contain a number of elements[2].

Any irregularity in the dismissal decision entails a sanction of absolute nullity, a sanction which is expressly provided by Article 78 of the Labor Code.

The present study aims to analyze whether the invocation of absolute nullity in the employee's complaint is or not subject to a peremption period, in which case the judicial practice in this matter will be analyzed, which for that matter has expressed different points of view on this aspect.

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[1] According to Article 58, para. 1 and 2 of the Labor Code, the dismissal of the employee represents the termination of the individual labor contract by the employer's initiative and may be ordered for reasons related to the employee or for reasons not related to the employee.

[2] Provided by Article 76 of the Labor Code, according to which, the dismissal decision shall be communicated to the employee in written form and must contain: a) the reasons for the dismissal, b) the period of notice on dismissal; c) the criteria for determining the order of priorities, according to Article 69 para. (2) letter d) only in the case of collective dismissal; d) the list of all the available jobs in the unit and the period in which the employees will opt to take up a vacant job, under the conditions of Article 64.

The study also highlights the impact of the Constitutional Court's Decision no. 279/2015[3] which ruled the admissibility of the constitutional challenge, and it was found that the provisions of Article 52 para. (1) letter b) the first sentence of the Labor Code are unconstitutional regarding the suspension decisions based on this legal provision issued prior to the publication of this decision.

1. *As for the deadline up to which the absolute nullity of the dismissal decision may be invoked in the dispute having as object the appeal against the dismissal decision:*

The employee's dismissal decision must comply with a number of requirements under the law regarding its content. Thus, the dismissal decision is communicated to the employee in writing and must contain a number of elements[4].

In the case of the employee's dismissal as a disciplinary sanction, if the employee has committed serious misconduct or repeated deviations from the labor discipline rules or from the ones stipulated in the individual labor contract, the applicable collective labor contract or the internal regulation, according to the provisions of Article 251, para. 1 of the Labor Code, under the sanction of absolute nullity, no action, with the exception of the one stipulated in Article 248, para. 1, letter a) of the Labor Code can be ordered before carrying out a prior disciplinary investigation. The same sanction is also provided by Article 78 of the Labor Code, according to which: the dismissal ordered in violation of the procedure provided by law is affected by absolute nullity.

Any irregularity in the dismissal proceedings follows the legal regime of absolute nullity, which sanctions the violation of a legal norm that protects a general interest, *ie* an imperative rule of public order (Boroi & Anghelescu, 2011). The legal regime of absolute nullity is characterized by the fact that it can be invoked by any person, including by the court *ex officio*, and is indefeasible.

Consequently, the aim pursued by the legislature by regulating the absolute nullity of the dismissal decision is to give the person concerned the opportunity to invoke this sanction before the court throughout the resolution of the appeal against the dismissal decision as the sanction of nullity may also be invoked by the court *ex officio*.

In this respect, the case law has shown that compliance with the mandatory legal provisions relative to the prior disciplinary investigation procedure is a legal duty of a substantive nature intrinsic to the measure of disciplinary sanction, being a guarantee for respecting the employee's right to defense before applying the disciplinary sanction. Its violation constitutes an express absolute nullity of the measure ruled[5]. Therefore, even if the applicant failed to rely on this ground of absolute nullity in the appeal, these grounds can also be invoked by the court *ex officio*[6].

The recent case law, however, outlined a point of view according to which the invocation of a reason for absolute nullity of the dismissal decision can be made only

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[3] Published in the Official Journal of Romania no. 431 of 17 June 2015, Part I.

[4] Provided by Article 76 of the Labor Code, according to which, the dismissal decision shall be communicated to the employee in written form and must contain: a) the reasons for the dismissal, b) the period of notice on dismissal; c) the criteria for determining the order of priorities, according to Article 69 para. (2) letter d) only in the case of collective dismissal; d) the list of all the available jobs in the unit and the period in which the employees will opt to take up a vacant job, under the conditions of Article 64.

[5] Decision of the Bucharest Court of Appeal, Civil Division VII and cases concerning labor disputes and social insurance no. 1337/2016

[6] The Judgment of Suceava District Court no. 1613/2015, maintained by the Decision of Suceava Court of Appeal, 1st Civil Section, no. 396 of 12 April 2016.

within the time limit provided by Article 252, para. 5 of the Labor Code, when the decision on disciplinary sanction can be challenged. In reasoning this point of view, it is argued that if one were to accept the opinion based on an absolute nullity, which is indefeasible, this would result in the situation in which the regulation of Article 252, para. 5 of the Labor Code regarding the period within which the sanctioning decision may be challenged would be void of effects. Therefore, appeals against any such decisions that invoke absolute nullity could anytime be considered admissible[7].

We believe that this view is wrong. The invocation of the ground of absolute nullity can be made only in the context of an appeal within the time limit provided by Article 252, para. 5 of the Labor Code. In the absence of an appeal within the time-limit, the absolute nullity can not be invoked by preparing a separate request. However, if such an objection has been made, the complainant may raise any grounds for absolute nullity throughout the litigation before the court of first instance and the appeal court. Moreover, the court notified with such a request would have to raise of its own motion such a ground. The purpose of the provision is to protect the employee, considered to be the weaker part of the contract.

In this respect, the provisions of Article 1247, para. 3 of the Labor Code are incident, which expressly stipulates that the court is obliged to invoke absolute nullity, applicable provisions according to Article 278, para. 1 of the same normative act. In order to eliminate any contrary interpretation, we consider that by *lege ferenda* it would be advisable to supplement the provisions of Article 78 of the Labor Code, stating that the grounds for absolute nullity should also be invoked by the court *ex officio*. As emphasized in the legal literature, the rules on dismissal are of public order, they have an imperative feature (Ştefănescu, 2017).

2. Regarding the effects of the Constitutional Court's Decision no. 279/2015:

The Constitutional Court Decision no. 279/2015[8] ruled on the admissibility of the constitutional challenge invoked and found that the provisions of Article 52 para. (1) letter b) the first sentence of the Labor Code[9] are unconstitutional. According to this legal provision, the individual labor contract can be suspended in the following situations: if the employer has filed a criminal complaint against the employee or the employee has been sued for criminal offenses incompatible with his/her position, until the final judgment.

The Court has held that the suspension of the individual labor contract is a measure suited to the purpose pursued and is capable, in abstract terms, to fulfill its requirements. Although the protection of the employees' rights, which is subordinated to the employer, is a form of ensuring the protection of the right to work, as a fundamental right, the legislator is also compelled to ensure the protection of the employer's rights equally by establishing measures capable of achieving the intended purpose. Therefore, the protection of the right to work can not be generalized with the consequence of affecting the employer's right to exercise his economic freedom. The Court also held that the regulation regarding the employer's ability to suspend an individual labor contract if he considers that his interests would be affected by the continued activity of the employee, as

[7] The Judgment of the Mureş County Court no. 692/2017, unpublished.
[8] Published in the Official Journal of Romania no. 431 of 17 June 2015, Part I.
[9] The doctrine also expressed the view according to which the suspension should in this case be mandatory for the employer rather than optional. See (Ţiclea, et al., 2004).

a result of his alleged illicit activity, is a necessary tool for ensuring the effective protection of its rights and interests.

As to the proportionality of the measure regulated by Article 52 para. (1) letter b) the first sentence of Law no. 53/2003, namely to achieve a fair balance between the competing rights, that is the right to work and the right of the employer to take the necessary measures for the proper conduct of the economic activity, the Court held that the suspension of the individual labor contract, on the initiative of the employer, when there are reasons to assess that the unlawful activity of the employee would jeopardize the interests of the employer, must be subject to conditions ensuring that the measure does not have an arbitrary feature. In other words, the Court has held that, insofar as the law confers the employer the possibility to order the suspension of the individual labor contract in order to protect his economic interests, as an expression of Article 45 of the Constitution, such a measure, with far-reaching consequences on the rights of the employee, must be accompanied by the guarantee of an objective and well founded decision by the employer. In this respect, the Court has held that the measure of suspension determines the temporary cessation of the obligations of the parties that originate from the individual labor contract, and in the hypothesis of the analyzed law, the cause of the suspension does not operate by law, nor is it an expression of the will of the employee but of the employer.

By the Decision no. 19/2016[10] the High Court of Cassation and Justice decided to admit the notification on the preliminary judgment and consequently it established that: "following the decision of the Constitutional Court no. 279 of 23 April 2015, the provisions of Article 52 para. 1, letter b) the first sentence of the Labor Code no longer produce effects and give rise to a claim of compensation equivalent to the remuneration due to the employees throughout the suspension, in the cases pending conclusive ruling at the date of publication of the constitutional administrative court decision in the Official Journal of Romania, Part I."

On the effects of the Constitutional Court's Decision no. 279/2015, it is necessary to examine whether and to what extent they concern also the suspension decisions issued prior to the publication of the decision, which have been challenged by the employee and in respect of which rejection decisions have been pronounced final.

The case law expressed the view that the Constitutional Court's Decision no. 279/2015 can not have effects with regard to the suspension decisions, which have been challenged and final, and in which the unconstitutionality of the provisions of Article 52, para. 1, letter b) of the Labor Code was not invoked, as this would be equivalent to the attribution of effects, from the outset to the decision of the Constitutional Court[11].

From a contrary point of view, the enforcement of the Constitutional Court decisions represents an obligation only for the future for all the bodies and institutions charged with attributions in this matter, but the effects of the Constitutional Court's findings regarding the unconstitutionality of certain legal provisions have also a retroactive effect, up to the

[10] Published in the Official Journal of Romania no. 103 of 6 February 2017, Part I.
[11] See the Judgment of the County Court Dolj, no. 380/2017, pronounced in File no. 2362/63/2016, unpublished.

point where those legal provisions have produced concrete manifestations in the civil circuit[12].

Therefore, even if the Constitutional Court's decision was pronounced after the decision on suspension was issued, this decision can not remain unaffected as by continuation it has a successive feature. By the effect of the Constitutional Court's ruling, the legal basis for the suspension decisions has ceased to exist.

In this respect, the Decision of the High Court of Cassation and Justice no. 12/2011 regarding the competent body to judge the appeal in the interest of law forming the subject of File no. 14/2011, emphasized that: "From the point of view of the transitional law, Article 147 para. (4) of the Constitution states that the decision of the Constitutional Court is generally binding, both for public authorities and institutions, as well as for individuals. As it is an imperative rule of public order, its general and immediate application can not be denied, otherwise it would mean that an unconstitutional act would continue to produce legal effects as if no new element appeared in the legal order, which the Constitution categorically refuses. The fact that the decisions of the Constitutional Court take effect only for the future gives expression to another constitutional principle, that of non-retroactivity, which means that certain rights definitively gained or the legal situations already established can not be affected".

Therefore, as long as no final decision has been taken in connection with the complaint made by the employer, the legal situation created in connection with the suspension of the individual labor contract is ongoing and as such it is not exhausted so that we could speak of an exhausted legal relationship or that the measure of suspension would have been completed.

Thus, the suspension decision in question produces successive effects over time, thus bearing the legal fluctuation, and can not have the same legal status as a decision with *uno ictu* enforcement, such as a dismissal decision[13].

As for the period within which the employee may notify the court so that it could determine the closure of the suspension effects, it is necessary to consider whether the provisions of Article 268, para. 1, letter a) of the Labor Code[14] or the provisions of Article 211, letter a) of Law no. 62/2011[15] are incident.

In our opinion, these provisions are not applicable because we are not in a situation where there is a challenge to claim the nullity of a suspension clause, but we are in the situation where we can determine the cessation of the effects of a decision as a result of

[12] Bucharest Court of Appeal, Section VII for Cases on labor disputes and social insurance, Decision no. 2841/2016 of 31 May 2016, available on http://www.euroavocatura.ro/jurisprudenta/4579/Decizia_de_concediere_bazata_pe_un_de_de_drept_declarat_neconstitutionale_Reintegrarea_salariatului_pe_postul_detinut_si_plata_despagubirilor

[13] The Judgment of the Mureș County Court no. 559/2017 issued in file no. 676/102/2017, unpublished.

[14] According to which *Applications for the resolution of a labor dispute may be formulated: a) within 30 calendar days from the date when the unilateral decision of the employer concerning the conclusion, execution, modification, suspension or termination of the individual labor contract was communicated*.

[15] Which stipulate that: *unilateral measures to enforce, modify, suspend or terminate an individual labor contract, including the payment of sums of money, may be appealed within 45 calendar days of the date on which the person concerned became aware of the measure.*

the Constitutional Court Decision no. 279/2015. Such an action follows the legal status of a declaratory action[16], and is not subject to any time limit.

This is because the employer has the obligation to comply with the provisions of the Constitutional Court Decision no. 279/2015, and if he fails to do so, the employee may address to the court. Therefore, even if the employee challenged the decision for suspension based on the provisions of Article 52, para. 1, letter b) of the Labor Code before the publication of the Constitutional Court's decision, this should not hinder submitting a court action to determine the cessation of the suspension effects[17].

Regarding the consequences of admitting an action for determining the cessation of the suspension decision, the first one is represented by the reintegration of the employee into the position previously held from the date of publication the suspension decision[18] in the Official Journal. The effects of the cessation of the measure can not occur as of the date of the measure because the provisions of Article 52, para. 2 of the Labor Code regarding the situation in which the suspension was not legally disposed cannot be applied by analogy[19].

Another important consequence is the compensation payable to the employee, which must be the equivalent of the salary rights that he would have had if he had worked for the employer. Even if the Decision of the High Court of Cassation and Justice no. 19/2016 refers only to the remuneration due to employees during the suspension, it is necessary to apply, for reasons of their identity, the provisions of Article 80, para. 1 of the Labor Code[20]. Therefore, the employee will have to be given all the rights he would have enjoyed, rights which should include not only the salary but also any permanent or non-permanent bonuses which would have been due if he had worked for the employer.

2. CONCLUSIONS

Although the provisions of the Labor Code relating to Article 78 of the Labor Code are very clear in their content, they still give rise to divergent opinions in judicial practice, which is why we consider it appropriate to supplement them, expressly indicating the possibility of the court *ex officio* to invoke grounds for absolute nullity of the dismissal decision, within the complaint formulated by the employee.

Regarding the applicability of the Constitutional Court's Decision no. 279/2015, it appears that the judgment of the High Court of Cassation and Justice no. 19/2016 is not fully enlightening for the courts. These decisions state that following the declaration of the unconstitutionality of Article 52 para. (1) letter b) the first sentence of the Labor Code, the right to compensation is granted to the employee throughout the suspension of the employment contract and only in the case of the legal relations concluded definitively,

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[16] For more information regarding the legal status of the action to be taken, (Tăbârcă, 2013), (Boroi & Stancu, 2015), (Leș, 2014).

[17] See the Decision of the Bucharest Court of Appeal, Section VII for Cases concerning labor disputes and social insurance no. 4410/2016, unpublished.

[18] See the Judgment of the Court of Appeal Tîrgu Mureș no. 406/A/25.10.2017 pronounced in File no. 676/102/2017, unpublished.

[19] See the Judgment of the Court of Appeal Cluj, Civil Division I, no. 141/A/2017, unpublished.

[20] According to this legal text, *if the dismissal was done in a non-traditional or unlawful way, the court would order its annulment and would force the employer to pay equal compensation with the indexed, increased and updated salaries and the other rights that the employee would have received*.

before the issue of the Constitutional Court decision, the application of the Constitutional Court will not be questioned. However, the case law did not give efficiency to the Decision of the Constitutional Court no. 279/2015 in the case of all suspension decisions taking effect on the date of publication of this decision, considering that the rule of non-retroactivity of the unconstitutionality decision would be affected in this way.

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