

THE RIGHT TO WORK IN THE CONTEXT OF THE STATE OF EMERGENCY. SOLUTIONS AND CONTROVERSIES

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ABSTRACT: *As a result of the Decree of the President of Romania no. 195 of 16 March 2020 by which the state of emergency was declared, employers sought to identify, where possible, solutions for continued employment for their employees. Telework and work from home have been considered viable alternative solutions in certain areas, allowing employees to work in conditions that would ensure their health protection. In other cases, employers decided on the suspension of individual employment contracts or even dismissal. This study aims to analyze the terms in which the right to work has been affected during the state of emergency, the legal solutions that could be identified but also the controversies arisen.*

KEYWORDS: *the state of emergency; employer; employee; telework; work from home.*
JEL code: K31

Special measures must always be taken in exceptional circumstances. Following the establishment of the state of emergency, possible solutions in the area of employment relations were identified by Decree No 195/16.03.2020, in the form of teleworking or domestic work.

1. DEFINITION OF TELEWORKING

Teleworking means the form of work organization whereby the employee, on a regular and voluntary basis, performs the duties assigned to his function, occupation or profession in a place other than the place of employment organized by the employer, at least one day a month, using information and communication technology, and teleworker is any employed person working under these conditions.

It follows from the contents of this definition that teleworking: is a form of work organization; it is carried out regularly and voluntarily; it is carried out outside the workplace organized by the employer; it is carried out at least one day a month; it is carried out using information and communication technology.

What characterizes the legal concept of teleworking is the functional - organizational combination of two elements, topographical and technological, respectively, in order to

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form a teleworking relationship, which is performed outside the employer's employment by means of the technological element, it must be functionally and legally linked to the employer's headquarters.

The Regulation differs from that at European level contained in the Framework Agreement on teleworking concluded on 16 July 2002 between the Union of Industriallists of the European Community, the European Union of Crafts and small and medium-sized enterprises, The European Center of public enterprises and enterprises of General Economic interest and the European Trade Union Confederation, in which telemedicine is defined as a form of organization and/or work carried out using information technology in the framework of a contract or employment relationship, where this – which could also be achieved at the employer's premises – is regularly done outside the employer's premises.

The definition has been criticized on the grounds that the regular nature of an activity is that it is carried out regularly, i.e. predominantly, as a result of the specific teleworking regime; or if the period for which the consideration of the parties to an individual contract of employment is generally fixed as a month, as correctly retained by the romanian legislator (which can be "down" to the week), it is clear that the performance of the duties specific to the position under this regime "at least one day per month" is not regular but, on the contrary, incidental.

The French Labor Code rules seem much closer to the definition contained in the European Act: teleworking is the form of work organization according to which the worker, who is able to operate on the premises of the employer, perform it outside such premises on a regular and voluntary basis using information and communication technologies in the framework of a contract of employment or an act amending it¹ - article L1222-9 from The Labour Code.

2. CONDITIONS FOR TELEWORKING

Pursuant to article 33 of Decree No 195/16.03.2020, central and local public institutions and authorities, autonomous administrative authorities, autonomous companies, national companies and companies with which the State or an administrative-territorial unit is a sole or majority shareholder, private-owned companies shall, where possible, introduce, during the emergency, domestic or tele-working, by unilateral act of the employer.

It follows from these legal provisions that teleworking is ordered unilaterally by the employer and does not require the employee's consent if ordered unilaterally and the measure is to be communicated to the employee. In our view, the conclusion of an additional agreement with the agreement of both parties is certainly not excluded.

The employer's decision or the amendment relating to teleworking must have the content laid down in article 5 (2) of Law No 81/2018, namely: (a) the indication that the employee is working on a tele-working basis; (b) the period and/or days during which he is pursuing his activity in a job organized by the employer; (c) location(s) of the teleworking activity, as agreed by the parties; (d) the program under which the employer

¹https://www.legifrance.gouv.fr/codes/section_lc/LEGITEXT000006072050/LEGISCTA000025558058?codeTitre=Code+du+travail#LEGIARTI000037388731.

is entitled to check the work of the telescoping and the practical means of carrying out the check; (f) the responsibilities of the agreed parties according to the place(s) of deployment of telemedicine, including their responsibilities in the field of safety and health at work in accordance with the provisions of articles 7 and 8; (g) an obligation on the employer to ensure the transport to and from the place where the teleworking material is employed in his activity, as appropriate; (h) an obligation on the employer to inform telescopes of the provisions of the law, the applicable collective employment agreement and/or the internal rules concerning the protection of personal data, and the obligation on teleshopping to comply with those provisions; (i) the measures taken by the employer to ensure that the telescoping is not isolated from other employees and that the employer is able to meet with colleagues regularly; (j) the conditions under which the employer bears the cost of the work on a telemonca basis.

As regards the obligations of the parties, Article 7 of Law No 81/2018 lays down the obligations of the employer and Article 8, paragraph 2, of the same legal text lays down the obligations of the employee².

Can an employee apply for teleworking or work from home? Although according to legal texts the initiative concerning the carrying out of teleworking belongs to the employer, there have also been situations in which the employee has requested the work to be carried out in this way and has referred to the court in this respect.

The application registered by the applicant as an employee has therefore asked the court, in the court ruling which he will make, to find that the specific nature of the activity he is engaged in at the workplace gives him the right to pursue his activity at a distance during the emergency, Established by Decree No 195/2020 of the President of Romania and prolonged by Decree No 240/220 of the President of Romania.

On the basis of the arguments, the complainant salaried showed that he had been able to work as a telemunca since 13 March 2020, and did not claim from his employer the material resources needed to carry out his professional activity (computer equipment, telephone and internet technology), bearing in mind that they possess and use them, which are capable of operating, thus enabling them to perform their duties properly. The complainant also showed that it is a vulnerable person with 53 years of age and is diabetes, has acute respiratory insufficiency or other illnesses causing danger to those infected by CODID 19.

The first instance accepted the applicant's request, showing that, in the context of the emergence and spread of the new coronavirus, including in Romania, which brought with it the need for a real phenomenon of social distance, telemunca and domestic work should be consolidated as real resorts to manage the present situation, both for companies

² According to this legal text, the employee must inform the employer of the work equipment used and the conditions existing at the places where the work is carried out on tele-working equipment and give him access, as far as possible, with a view to establishing and implementing safety and health measures at work, necessary under the terms of the individual employment contract, or for the purpose of investigation of events; (b) not to change the safety and health conditions at work of the places where the tele-work activity is carried out; (c) use only work equipment which does not endanger its safety and health; (D) carry out their activities in accordance with the provisions concerning the obligations of workers as laid down in the Safety and Health at work Act No 319/2006, as amended, comply with the specific rules and restrictions laid down by the employer on used internet networks or on the use of the equipment made available.

which can also be carried out in this way and for their employees, whose health status is protected under such conditions.

The decision on appeal brought an end to the judgment of the first court, stating that the applicant could submit to the court the alleged abusive refusal of the employer or require him to take protective measures against COVID 19, or regulate its activity in the form of telematics or home work by issuing a unilateral act to that effect.

The applicant has, however, regulated his activity at a distance by itself and has given the court an action for a determination of a right, which, according to Article 35 of the Code, civil procedure is not admissible if the party can request the enforcement of the right by any means prescribed by law.

As the complainant had this route as indicated above, the action on the finding cannot be received.

In addition, by Decision No 173/2020, the Court of Appeal Timisoara rejected the application of the employed applicant for an obligation on the employer to give his consent to the applicant's employment at home for a period of emergency, while maintaining that, Although it was established by Decree No 195/2020 that private equity companies introduce, where possible, during the emergency, work at home by unilateral act of the employer, however this legal provision has not created a right for employees to work at home, but it has given employers the possibility to change the employment relationship unilaterally, not being bound by the employee's agreement to work at home.

In fact, Decree No 195/2020 only provides for the possibility for the employer to decide on the modification of the individual employment contract to that effect. However, I believe that courts can intervene in the event that the employee decides to take a more unfavorable measure for him, namely to suspend the individual employment contract or even to dismiss the employee.

3. HOME WORK

Domestic employees are those employees who carry out, at their place of residence, the specific tasks assigned to their employment. In order to carry out their duties, domestic workers shall determine their own working hours and the employer shall have the right to check the work of the domestic employee under the conditions laid down in the individual employment contract.

With regard to the employer's unilateral decision or the supplement to work at home, these must include: The express statement that the employee is working at home; the scheme under which the employer is entitled to check the employment of his employee and the practical arrangements for carrying out the check and the employer's obligation to ensure the transport to and from the employee's home, as the case may be, of raw materials and materials used in the activity, and the finished products it produces . Similar to the teleworking employee, the domestic employee shall enjoy all the rights recognized by law and by the collective agreements applicable to the employee.

As regards the legal texts governing home work, they do not provide for the employer to bear the cost of raw materials and materials, or the cost of work. There are important similarities between teleworking and domestic work contracts, the main difference being that telemonca is the provision of the activity by computer means. In legal literature, teleworking was considered a variant of domestic work . As regards the benefits of home

work and teleworking have been highlighted in the doctrine: The harmonization of workers' professional and family interests, education and vocational training; the reduction of stress in the workplace; the dismantling of absenteeism; reducing the employer's spending on purchasing premises for work, utilities and, transport to work, equipment, service cars, etc.; fuel economy; reducing congestion; reducing road accidents; reducing pollution; reducing costs of money and time from and to the employer's headquarters; increasing the chances of people with disabilities in the labor market.

4. OTHER MEASURES WHICH MAY BE ORDERED BY THE EMPLOYER

The employer may decide to apply the suspension measure to the individual contract as follows: a first measure is the *de jure* suspension under article 50, paragraph c of the Labor Code in the case of quarantine or *force majeure* under article 50, paragraph f of the Labor Code.

The suspension of rights shall be effective irrespective of the existence of any evidence of the parties' wishes.

The employer may also suspend, in accordance with Article 52 (c) of the Labor Code, the temporary interruption or reduction of the activity, without termination of the employment relationship, for economic, technological, structural or similar reasons.

A more drastic measure could be taken by the employer in accordance with the provisions of Article 65-77 of the Labor Code.

This is a dismissal for reasons other than the employee's personal status and represents the termination of the individual employment contract resulting from the termination of the employee's employment for one or more reasons not connected with the employee's person. Job abolition must be effective and have a real and serious cause.

Termination shall take effect when the place of employment is removed from the employer's structure, no longer in his organization chart or in the State of function, and necessarily implies the definitive nature of the termination. The cause is real when it is of an objective nature, that is to say it is imposed by economic difficulties or technological changes, independent of the good or bad faith of the employer, and is serious when obvious needs to improve the activity do not conceal reality.

5. CONCLUSIONS

We believe that the application of all these measures in the area of employment relations is still topical, even if the state of emergency has ceased and must be the result of an analysis of the actual situation and, of course, be taken in good faith by the employer. Otherwise, such measures should be subject to censorship by the court. As regards telemedicine and home work, these forms of work organization will in the future be widely used, either exclusively or alternatively together with other forms.