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PROMOTING AND PROTECTING EMPLOYEES' RIGHTS AND THE EMPLOYER OBLIGATIONS IN THE DOMAIN OF WORK RELATIONS PROVIDED IN SPECIAL LAWS

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ABSTRACT

Promoting and protecting the employees' rights represents a continuous concern, not only for the Parliament, but also for the doctrine and for all of us.

This research looks to introduce these obligations and to present, in particular, the criteria to which the employer needs to comply fully and properly in such a manner that the employees' rights to work are respected. This obligation of the employers is derived from the employees' right to work. With this obligation, the employers ensure the full knowledge of the vacancies to any interested person and also it is ensured an access to vacancies for the possible employees.

Furthermore, according to article 8 from the Labour Code, the employment relationships shall be based on the principle of consent and good faith. The participants to the employment relationships, for the proper development of such relationships, shall inform and consult each other, under the terms of the laws and collective labour agreements.

Key-words*: employer, employee, work relations, Romanian Labour Inspection, human rights.*

JEL classification: K10, K23, K31

Promoting and protecting the employees' rights represents a continuous concern, not only for the Parliament, but also for the doctrine and for all of us.

Protecting employees' rights can be achieved by both contentious and non-contentious proceedings. Contentious proceedings may require for certain people advancing expenses, while non-contentious proceedings can be accomplished without further expenses through public institutions (the Mayor; the Labour Inspection; the Prefect)

In this article, we have analysed the legal provisions less known by the employers and the employees, legal provisions that require a number of obligations which fall within the responsibility of the employers. These obligations

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require that the employers manage some administrative procedures, not only in their relationship with the employees, but also in their relationship with some public institutions, such as County Unemployment Agencies or the Territorial Labour Inspectorate. This research looks to introduce these obligations and to present, in particular, the criteria to which the employer needs to comply fully and properly in such a manner that the employees' rights to work are respected. This obligation of the employers is derived from the employees' right to work. With this obligation, the employers ensure the full knowledge of the vacancies to any interested person and also it is ensured an access to vacancies for the possible employees.

According to the provisions of article 6 of the International Covenant on Economic, Social and Cultural Rights signed on 16 December 1966, it is provisioned that the State Parties recognise the right to work which implies the right that any person has to obtain the possibility to earn a living by a freely chosen or accepted work and will take appropriate measurements in order to ensure that this right is guaranteed[1].

"*Experience shows that economic growth is not sufficient. We must do more to empower individuals through decent work, support people through social protection, and ensure the voices of the poor and marginalized are heard. As we continue our efforts to achieve the Millenium Development Goals and shape a post-2015 development agenda, let us make social justice central to achieving equitable and sustainable growth for all*"[2].

Furthermore, according to article 8 from the Labour Code, the employment relationships shall be based on the principle of consent and good faith. The participants to the employment relationships, for the proper development of such relationships, shall inform and consult each other, under the terms of the laws and collective labour agreements[3]. Therefore, the employers' legal obligation to announce the vacancies/new created vacancies represents one of the existent measures to guarantee the right to work[4].

As we will explain later, the instruments and the means of verifying the employer have an administrative nature and are closely linked to the notion of

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[1] See I. M. Zlătescu, E. Marinache, R. Şerbănescu (coordinators), *Principalele instrumente internationale privind drepturile omului la care Romania este parte*, vol. 1, 8th edition, revised, Publisher: I.R.D.O., Bucharest, 2006, pp. 14-15. The International Convenant on Economic, Social and Cultural Rights, also available at http://www.irdo.ro/file.php?fisiere_id=79&inline accessed on 25th September 2016;

[2] U.N. Secretary-General Ban Ki-moon Message for the World Day of Social Justice, 20 February 2014, for further details see: *Rules of the game: A brief introduction to international labour standards,* International Labour Office. - Geneva: ILO, Third Revised Edition 2014; www.ilo.org.

[3] For the good faith in labour relations and protecting the employee`s rights, please see: C. Gîlcă, *Codul muncii comentat şi adnotat*, 2nd edition, Publisher ROSETTI International, Bucharest, 2015, pp. 48-51; M.-C. Preduț, *Codul muncii comentat*, Publisher: Universul Juridic, Bucharest, 2016, pp. 38-39.

[4] T. Toader, M. Safta, *Constituția României: decizii ale Curții Constituționale, hotărâri CEDO, hotărâri CJUE, legislație conexă*, Publisher: Hamangiu, Bucharest, 2015, pp. 175-182.

good governance. Therefore, we will be able to observe the fact that the public institutions are competing to protect the employees' rights and implicitly taking measures of an administrative measure when required.

In this article we intended to present the most important obligations of the employers regarding employment relations, without exhausting the analysed subject.

The concept of good governance, transposed in the matter of employment relations, concerns, from our point of view, all instruments and administrative procedures that the public institutions use to protect the employees' rights, by non-contentious proceedings [5].

In the matter of good governance, institutions such as the Labour Inspectorate and County Unemployment Agencies also have an important role to play as administrative authorities that defend and promote the employees' rights.

1. Obligations regulated by the Social Dialogue Law no. 62/2010

1.1 Employer's refusal to start negotiations on the collective agreement

In accordance with the provisions of article 229 paragraph 2 of the Labour Code and article 129 of the Law no. 62/2010, negotiations on the collective agreement is required only for units with at least 21 employees[6].

The legislation provides that the employer or the employer's organization initiates the collective agreement at least 45 calendar days before the date of expiry of the collective agreements or the date of expiry of the applicable period of the stipulated terms of the additional papers to the collective agreements[7]. Given the case that the employer or the employer's organization does not initiate the negotiation, it will begin at the written request of the trade union representation or of the employees' representatives, at the latest 10 days after communicating the request.

What do we understand by "collective negotiation"? By this phrase, we understand the negotiation between employer's representatives and the trade union representation or the employees' representatives. Therefore, for example, if the workers of an employer do not belong to any trade union representation, the employer is required to take measures regarding the convocation of an employees' general meeting in order to designate the employees' representatives.

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[5] For the term "good governance", see E. Bălan, *Instituții administrative*, Publisher: C.H. Beck, Bucharest, 2008.

[6] For more details see: Ion. T. Ştefănescu, *Tratat teoretic şi practic de drept al muncii*, 2nd edition, revised and completed, Publisher: Universul Juridic, Bucharest, 2012, pp. 144-186; Al. Țiclea, *Tratat de jurisprudență în materia dreptului muncii*, Publisher: Universul Juridic, Bucharest, 2011, pp. 22-28; C. Gîlcă, *Codul muncii: adnotat*, Publisher: C.H. Beck, Bucharest, 2008, pp. 492-499.

[7] See also Ion. T. Ştefănescu, *op. cit.*, 2012, pp. 158-159.

We must bring into attention the fact that, given the situation that there is a trade union representation at unit level, the employer is required to carry out the negotiations with the trade union representatives. "*At unit level, the collective agreement must be negotiated and brought to a conclusion with the trade union representation and only if such a trade union representation does not exist, a conclusion can be made with the elected employees' representatives, according to the legislation matters*"[8].

After the election of the employees' representatives, the employer will convene the employees' representatives with the intention to start the collective negotiations.

We emphasize on the fact that the collective negotiation is being held between the employer's representatives and the trade union representatives or the employees' representatives if a trade union does not exist.

Therefore, the convocation with at least 45 calendar days before the date of expiry of the collective agreements refers to the convocation of the trade union representatives or the employees' representatives, which is carried out by the employer and does not refer to the convocation of the general assembly of the employees.

What happens if the trade union does not exist and the employees refuse to elect their representatives?

In spite of the fact that this kind of situation could be hard to believe, in practice there have been a few isolated cases. In it has been recommended the "*introduction of a clause in the intern regulation which implies that refusal of choosing the employees' representatives results in a disciplinary irregularity. Therefore, in the same intern regulation there will be established the sanctions in this particular case of disciplinary irregularity*"[9].

"*The employees' refusal of choosing their own representatives prevents the employer from fulfilling the obligation regarding the initiation CCC. As a result, he has the right to decide, within the intern regulation, that a refusal of such kind constitutes a disciplinary irregularity and can be sanctioned as such*"[10].

From our point to view, this opinion is not a correct one and it departs from the letter and spirit of the law.

The assumption from which we should begin is that electing the employees' representatives is an employee right, not an obligation.

Indeed the legislation requires the employer the initiative to begin the collective negotiations, sanctioning him in case of refusal or passivity. But,

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[8] C.A. Bucuresti, VII[th] civil section and for causes regarding labour conflicts and social insurances, decision no. 145/R/2005 published in "Revista Română de Dreptul Muncii", no. 3/2005 quoted after C. Gîlcă, *op. cit.*, 2008, p. 497.

[9] http://legislatiamuncii.manager.ro/a/21837/refuzul-salariatilor-de-a-si-alege-reprezentantii-constituie-abatere-disciplinara.html?utm_source=rev-codul_muncii-03082016&utm_medium=email&utm_campaign=newsletter&uid= accessed on 13[th] October 2016, 06:37 p.m.

[10] *Ibid.*

furthermore, the legislator states as a contravention this situation of refusal or not beginning the negotiations as a measure of protection of the employees. We are considering the fact that the legislator assumed relatively the employees' will of electing their representatives.

Turning back, what happens if the union does not exist and the employees refuse to elect their representatives?

In this case, we consider that the employer would have to convene the general assembly at least twice. If the employees refuse, or they leave the meeting, or the quorum does not exist, the employer will complete a minute of the meeting which will contain the current situation as well as the refusal of the employees.

Giving the situation, from our point of view, the employer was involved in an objective impossibility to "begin the collective negotiation" as stipulated in art 129 paragraph 3 from the Law no. 62/2011. In this case, it's objectively impossible to initiate the negotiations, as long as the employees refuse to choose their representatives. We consider that the employer has shown his good faith by convening twice the general assembly.

In this case, we believe that the employees are at fault for refusing to choose their representatives.

Therefore, in order for a contravention to exist, in the published literature of administrative law[11] it is mentioned constantly that *the fault* must exist (intention or misconduct). Whereas, in this case, we consider the refusal of the employees to elect their representatives as a ground for exemption of employers' liability that must be assimilated to unforeseeable circumstances laid down in art. 1351 paragraph 3 of the Civil Code "The unforeseeable circumstances is an event that cannot be predicted nor prevented by the one who would have been called upon if the event hadn't happened."

As a result, from our point of view, the employees' refusal represents and event that cannot be predicted nor prevented by the employer.

We need to mention that from our opinion the provisions of the Civil Code indicated above are perfectly compatible and applicable regarding work relationships, given the fact that the Civil Code represents the rule of law common to each branch of law.

In view of the above, in a given situation, we consider that the employer is exonerated of contravention as laid down in art. 217 lit. b) ("The employer's refusal of initiating the negotiation of the collective agreement) of Law no. 62/2011 because the employer has shown his good faith by fulfilling his obligations.

According to the provisions in art 217 paragraph 1 lit b) of Law no. 62/2011, the employer's refusal to initiate the negotiations of the collective agreement constitutes a contravention and it is sanctioned with a fine between 5.000 lei and 10.000 lei.

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[11] E. M. Fodor, *Drept administrativ*, Publisher: Albastră, Cluj-Napoca, 2008, pp. 309-310.

Contravention finding and applying sanctions are made by the Labour Inspectors.

It is to be remembered the fact that it is not laid down the possibility of the acquittal of half of the fine's minimum within 48h.

2. Obligations regulated by the Law no. 76/2002 regarding the insurance system for unemployment and the stimulation of the work force

2.1 The employers have the obligation to submit the vacancies to the County Agency for Employment to which they belong, within 5 working days after the posts have fallen vacant.

Therefore, according to the provisions of article 10 paragraph 1 of Law no. 76/2002, the employers have the obligation to submit to the Employment Agencies from their County, respectively from the municipality of Bucharest, hereafter referred to as Employment Agencies, to which they belong to, as head office or permanent residence, all the vacancies, within 5 working days after the posts have fallen vacant. Government Decision no. 119/2014 for modification and supplementing the Implementing rules for the application of Law no. 76/2002 came with further explanations and the provision of a specific method in which the employer must fulfil his obligation provisioned by article 10 of Law no. 76/2002. Otherwise, Art. 3, paragraph 1 from Government Decision no. 174/2002: *by the term vacancies, according to art. 10 paragraph (1) and (3) of this Law, it is understood the posts which became available as a result of the termination of the employment relationship, as well as newly formed posts.*

This obligation of the employers derives from the employees' right to work. With this obligation, the employers ensure an access to vacancies for any person that is interested and therefore it is ensured an access to the vacancies for the potential employees. According to the provisions of article 6 of the International Covenant on Economic, Social and Cultural Rights signed on 16 December 1966, it is provisioned that the State Parties recognise the right to work which implies the right that any person has to obtain the possibility to earn a living by a freely chosen or accepted work and will take appropriate measurements in order to ensure that this right is guaranteed[12]. Therefore, the employer's legal obligation to make the vacancies / newly created vacancies public represents one of the existent measures that were taken in order to ensure that the right to work is guaranteed.

[12] See I. M. Zlătescu, E. Marinache, R. Serbanescu (coordinators), *Principalele instrumente internationale privind drepturile omului la care Romania este parte*, vol. 1, 8th edition, revised, Publisher: I.R.D.O., Bucharest, 2006, pp. 14-15. The international convenant on economic, social and cultural rights, also available at http://www.irdo.ro/file.php?fisiere_id= 79&inline accessed on 25th September 2016;

It is of great importance we remember that the vacancies are submitted to the County Agency in the area of the employer's headquarters.

Furthermore, as we can see, the law does not distinguish whether the employer is a natural person, a private legal person, a public legal person or any other form of organization regulated by the law. Essentially, there's an employer who wished to hire an employee for a certain job.

What happens if the vacancy is found in another locality where the employer has another branch or place of business? In this case, the employer will complete in Annex 1A at implementing rules the fact that the post is found in another locality, existing, in this regard, a section dedicated to this mention.

The purpose of these provisions is that of making the vacancies known by anyone interested. Moreover, we must remember that the purpose of this obligation to submit the vacancies collates with the County Unemployment Agencies' attributions to support unemployed people in order to find work through redistributions. We mention that among the objectives of the County Unemployment Agencies there are included: employment and re-employment of the people in search for work; preventing unemployment and combating its social effects;

Symmetrically, the County Unemployment Agencies have the obligation to make the vacancies public, not only by displaying them on a paper format at the County and Local Agencies' Headquarters but also on the County Agencies' websites.

According to article 113 paragraph a) the failure to comply with the obligations referred to in article 10 paragraph 1 and 3 constitutes a contravention and it is penalised with a contravention from 3000 lei to 5000 lei (article 114 paragraph 1 letter a)[13].

According to article 114 paragraph 2, the infringer is able to pay, at short notice or 48 hours within the closure of the minute of the meeting, or, depending on the case, communicated, half of the minimum fine provisioned in paragraph (1), this possibility being especially mentioned in the minute.

According to art. 116 paragraph 1, finding and sanctioning the contraventions provisioned at article 113 are done by the control bodies of Ministry of Labour, Family, Social Services and Elder People, Labour Inspection, Employment National Agency and by other bodies that, according to the law, have the right to conduct inspections.

We observe that this contravention can be found and sanctioned by the control bodies of the Labour Inspection and by other bodies that, according to the law, have the right to conduct inspections. From our point of view, this provision is questionable. Given the fact that this communication of the vacancies is made in

[13] See Craiova Court, civil decision no. 8368/2014, available at http://www.rolii.ro/hotarari/577679eab32a9aa433f54cf1 accessed on 29th January 2017

relation with the Employment County Agency located in the employer's area, we consider that only the clerks from the Employment County Agency from a certain territorial unit should have the power of audit and sanctioning.

2.2 Employers are required to report the Employment Agencies in the area the occupied reported vacancies, according to paragraph (1) as being vacancies, at the latest 1 day after it was occupied

According to article 10 paragraph 3 of the law no. 76/2002, the employers are required to report the Employment Agencies in the area the occupation of the vacancies that were reported according to paragraph (1), at the latest 1 day after it was occupied, also taking into consideration the law conditions.

Government Decision no. 119/2014 for modification and supplementing the Implementing rules for the application of Law No. 76/2002 came with further explanations and the provision regarding the specific way the employer is obliged to meet the requirement provisioned of article 10 of Law no. 76/2002. Therefore, Art. 3, paragraph 2 of the Government Decision no. 174/2002 stipulates that: communicating the vacancies by the employers, as well as the communicating the occupation of the vacancies by the employers will be done by paper or online, according to the form provisioned in annex no. 1B. By online, we mean on magnetic medium, e-mail or the online service for communicating the vacancies or their occupation, offered by the Employment National Agency.

Regarding these provisions, the employer has the obligation to communicate the occupation of the vacancy on the same day with the beginning of the activity or in the next working day. We observe that the obligation to communicate the employment must be fulfilled in the first starting work day, or the next working day, and not at the signing of the individual employment contract.

2.3. Not using the Job Classification in Romania in fulfilling official documents

According to article 15 of Law no. 76/2002, the employer is required to use on the official documents he completes only the occupations provisioned in the Job Classification in Romania (the COR code).

We observe that the legislature provisions this obligation regarding the "official documents that he completes". Nor the Law no. 76/2002, nor the methodological norms of applying the law, do not define the notion of "official documents".

From our point of view, by official documents we must understand every document used by the employer in regards relations with the third parties. By third parties we understand any legal person or institution to which the employer issues official documents on which it is also mentioned the occupation of one or more employees.

We are considering that, in regards relations with their own employees, but exclusively at the internal level of the employer, some other designations can be utilized, others than those specified by COR (abbreviation in Romanian for Clasificarea Ocupațiilor din Romania) .

Therefore, it is very well known the fact that, in multinational societies, especially those established by entities from other states from EU or other countries, there are also some internal designations of some posts that do not correspond to the official designations in COR. We are mentioning, for example: "HR Specialist", "Senior assistant", "Junior HR Assistant", "Plant Manager", "Deputy Manager", "HR Manager", "CFO"- Chief Financial Officer.

A failure to comply with this obligation constitutes a contravention according to art 113, lit. b) and is sanctioned with a contravention fee from 3.000 lei to 5.000 lei, according to art. 114, 1 lit a).

According to art. 114 paragraph 2 the infringer can pay on the spot or within 48 hours from the closing of the report or, where appropriate, from the day it was communicated, half of the minimum fee provisioned in paragraph (1), this possibility being expressly mentioned in the report.

According to art. 116 paragraph 1, the finding and the sanctioning of the contraventions provisioned at article 113 are done by the control bodies of Ministry of Labour, Family, Social Services and Elder People, Labour Inspection, Employment National Agency and by other bodies that, according to the law, have the right to conduct inspections.

2.4 The obligation to notify the Employment County Agency about employing a person in unemployment who is compensated, within 3 days.

According to art. 41 paragraph 2 of Law 76/2002, the employers who have employed, according the law, people among those who beneficiate of unemployment compensations, have the obligation to notice within 3 days the employment agencies where they were recorded.

Regarding this obligation, several pertinent questions are being posed.

Firstly, when does the 3-day time-frame start? From the date the employment contract was signed or the date the activity is begun?

We observe that the legislation remembered does not specify exactly when the 3-day time-frame starts. From our point of view, the 3-day time-frame starts from the date the activity is begun, because that's the date of the actual employment, or otherwise said, this is the date of the 1st when the employment contract has effects and, consequently, the moment where the quality of a person in compensated unemployment ends.

The legislature is also questionable on the aspect that the employer has the obligation to notify the employment agencies to which the employers were previously recorded. A legitimate question is being posed: How can the employer find out whether a person is compensated or not?

From the beginning, we must mention that there isn't a complete database that includes all people that beneficiate of a compensation to which the employers have access to, nor at a county level, nor at a national one. Consequently, the employer is required to address a petition to the Employment County Agencies to find out whether the person he wishes to employ beneficiates or not of compensation.

Giving the fact that the time-frame of answer to a petition is 30 days, we could be facing an obstacle in hiring or even the loss of a potential employee because of bureaucracy.

From our point of view, to avoid a contravention to be applied, the employer has the possibility that, at each employment, to notify the Employment County Agency, by a notification or e-mail, in which it is specified that the person "W" with residency in "X" County was employed as "Y" beginning on the date "Z".

The legislature does not provision the content of the notification, but we consider that the notification must contain at least: the identification data of the employer, the identification data of the employee, the date the employment begun and the occupied post.

The purpose of this provision is to avoid receiving the compensation as well as the salary by the new employee. The legislature's intention is a good one, but as we noticed, it creates an obligation that is hard to fulfil by the employer. The employer doesn't know whether a person beneficiates or not from a compensation, which is the reason why, to make sure we are not liable to a contravention, the employers are required to notify the Employment County Agency where the person in unemployment is recorded.

Moreover, we also mention that a person that beneficiates from a compensation is allowed to be recorded only at the Employment County Agency in the County of the person's residence.

Therefore, for example, if an employer with headquarters in Cluj-Napoca, county of Cluj, hires a person with residence in Jibou, county of Sălaj, the employer will send the notification about employing the person to the Employment County Agency of Sălaj, not the Employment County Agency of Cluj.

Conclusions

As we have seen, the promotion and protection of human rights is a goal of the XXI century. Protecting employees' rights can be achieved by both contentious and non-contentious proceedings. Contentious proceedings may require for certain people advancing expenses, while non-contentious proceedings can be accomplished without further expenses through public institutions (the Mayor; the Labour Inspection; the Prefect).

In this article we have presented the main employers' obligations in relation to the right to work of people. As we have observed the legal rules are applied by administrative institutions through administrative procedures. Of course, these

rules are intended to protect employees' rights through non-contentious means, through the of state control institutions, as the Labour Inspection and the Unemployment Agencies.

So often, promoting and protecting the rights of employees through non-contentious procedures can be more expeditiously and does not imply costs. We have shown that these rules can be improved in terms of their content in order to be clearer and more predictable. Romanian legislator has established a number of significant sanctions for protecting the employees' rights.

In our opinion, the state institutions mentioned in the article should primarily guide employers because the latter know how to fulfil their obligations and only subsidiary to apply fines.

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