

## Private Law

### Considerations Regarding Legal and Real Grounds for Dismissal

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**Abstract:** Art. 77 of Labor Code refers to the fact that „in case of labor conflict the employer cannot invoke in Court other legal or practical grounds but those stipulated in the dismissal order” and Art. 61 lit. a of the Labor Code specifies the „repeated infringements”, we assume that in the dismissal order can be invoked more practical grounds if the application is done according to the legal grounds.

**Keywords:** dismissal order, practical ground, legal ground

Article 58 of Labour Code defines dismissal as the termination of collective bargaining by both the employer and the employee. This may occur on grounds that may or may not depend on the employee. Article 61 of Labour Code sets forth the circumstances in which the employer is entitled to dismiss the employee due to the latter’s personal reasons while Article 65, paragraph 1 prescribes dismissal on grounds that do not depend on the employee as the termination of collective bargaining as a result of job cancellation which is not whatsoever related to the employee.

The dismissal decision takes immediate effect from the moment in which it is communicated to the employee (Article 75 of Labour Code); the notice shall be written and is subject to cancellation unless it contains the following:

- a) grounds for dismissal
- b) the duration of the notice
- c) the prioritization criteria in case of collective dismissal
- d) the list of all available positions<sup>1</sup> and the deadline for employees to apply for such a vacancy<sup>2</sup> (Article 74 of Labour Code)

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<sup>1</sup> Bucharest Court of Appeal, Department of labour conflicts and labour dispute, Decision No. 1581/2004, published in the *Romanian Labour Code Magazine*, No. 4/2004, p. 120-121.

<sup>2</sup> Arad County Court, civil sentence no. 545/2003, in Țiclea, Alexandru (coordinator), *Labour Code*

The written form of the dismissal decision is an “*ad validitatem*”<sup>1</sup> condition. As far as the contents of the dismissal decision is concerned, the Labour Code mentions both categories of legal and real grounds<sup>2</sup>, according to Article 74 of Labour Code, paragraph 1 letter a.

The dismissal decision is a unilateral act, the manifestation of the employer’s will. Furthermore, the employer does not need to address to court or to other institutions in order to terminate legal work relations with a certain employee. But the employee is entitled to challenge the dismissal decision in court if he/she considers that it is not legally grounded. The employee is legally and constitutionally entitled to defend himself/herself against all unlawful or ungrounded abuses that may hinder his/ her ability to perform. The employee may use this right only if he is informed both of the real and legal grounds which the employer used when deciding to dismiss him/ her and the procedural means he/ she may appeal to in order to contest the decision. Thus, the dismissal decision shall be written and shall become void unless it has real<sup>3</sup> and legal grounds<sup>4</sup>, and it contains the period when is subject to contestation and the court where it may be contested (Article 62, paragraph 2 of Labour Code)<sup>5</sup>. The dismissal decision shall necessarily contain the real and the legal grounds that resulted in the actual dismissal, namely the explicit and grounded reasons, the description of the situation that led to dismissal as a legal means.

The dismissal decision in which the grounds for dismissal are only briefly mentioned and which does not contain the priority criteria is considered illegal<sup>6</sup>. In addition, such a decision shall include a list of all vacancies. The dismissal decision, be it individual or collective, is void if it does not include the vacancies<sup>7</sup>.

According to Article 77 of Labour Code, the employer shall not claim further grounds for dismissal but those that have been included in the dismissal decision<sup>8</sup>.

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*with comments*, second edition, Bucharest, Lumina Lex Publishing, 2006, p. 406.

<sup>1</sup> Beligrădeanu, Șerban, „Fundamentals on shape, content and cancellation of dismissal decision as reflected in the Labour Code”, in *Dreptul*, No. 6/2004, p. 35.

<sup>2</sup> *Ibidem*, p. 36.

<sup>3</sup> Ploiești Court of Appeal, civil sentence no. 222&1997, in Voicu, Marin, Popoacă, Mihaela, *Labour Code*, vol. I, Bucharest, Lumina Lex Publishing, 2001, p. 154.

<sup>4</sup> Constanța Court of Appeal, civil sentence no. 37/R/1995, *idem*, p. 153.

<sup>5</sup> Arad County Court, civil sentence no. 543/2003, in *Romanian Labour Code Magazine*, no. 2/2004, p. 123-124: The dismissal decision of the individual labour contract is declared null; the employer shall bring real and legal grounds and reveal the reasons for the removal of the employee’s defence, the legal grounds on the disciplinary sanction enforcement, appointing the competent authority on the matter.

<sup>6</sup> Bucharest Court of Appeal, Department 7 on civil matters and labour disputes, civil sentence no. 581/LM/2004, in Țiclea, Alexandru (coordinator), as before, p. 397.

<sup>7</sup> Bucharest Court of Appeal, Department of labour conflicts and labour dispute, Decision No. 1581/2004, published in the *Romanian Labour Code Magazine*, No. 4/2004, p. 120-121.

<sup>8</sup> Hunedoary County Court, sentence no. 669/2003, in *Romanian Labour Code Magazine*, no.2/2004, p. 143-144: Thus the employer may not invoke professional incompetence if the dismissal decision contains disciplinary infringements, namely failing to take in the new position and repeated non-attendance.

These provisions are meant to determine the legality of the dismissal decision and namely the procedural means the parties are eligible to use when pleading their cause. Furthermore, these provisions are similar to the provisions of article 126, paragraph 2 of the Constitution which stipulates that the lawmaker decides on the court procedures. Thus, when hearing a work conflict case, the court shall examine the legality of the real and legal grounds of the dismissal decision as expressed by the employer which is contested by the employee. As a consequence, any further real or legal grounds subsequently invoked by the employer shall not influence the legality of the already contested decision<sup>1</sup>.

In practice, it has been sustained that “the employer shouldn’t claim more real and legal grounds for dismissal.”<sup>2</sup>

We do not agree with such a solution because article 77 of Labour Code refers to other grounds than those included in the dismissal decisions<sup>3</sup> and not to their number. Although the statement is correct when referring to legal reasons (for example, the employer is not legally entitled to dismiss a person on disciplinary grounds according to article 61, letter a or on mental and physical disability grounds following the medical expertise<sup>4</sup>), it is not correct when referring to real reasons because the procedure and the effects are not always the same. Article 61, letter describes “repeated infringements”, and addresses the issue of more real grounds that can be taken into consideration when referring to dismissal.

In conclusion, one cannot invoke more legal grounds for dismissal, but can invoke more real grounds for the same legal grounds.

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<sup>1</sup> Constitutional Court Decision, no. 378/2004 in The National Gazette of Romania, Part I, no.936/13 October 2004 and Constitutional Court Decision, no. 1230/2007 in the National Gazette of Romania, no. 119/14 February 2008.

<sup>2</sup> Bucharest Court of Appeal, Department 7 of civil matters and labour conflicts and social insurances, decision no. 1931/R/7 June 2007, in *Judicial Practice Corpus on labour conflicts and social insurances 2006-2008*, Bucharest, Wolters Kluwer Publishing, 2009, no. 39, p. 200-205.

<sup>3</sup> Ștefănescu, Ion Traian, *Labour Law Treaty*, Bucharest, Wolters Kluwer Publishing, 2007, p. 380.

<sup>4</sup> For example, when dismissed on grounds of physical and/or mental disabilities, the employee is entitled to claim compensation, according to the conditions in the respective collective labour contract or in the individual labour contract, accordingly (art. 64, par.5 of Labour Code).