Arguments for Sustaining the Need to Modify the Legal Status Regarding the Mutual Consent Settlement of Individual Labour Conflicts

Lavinia ONICA CHIPEA[1]

Abstract: The paper aims to identify and itemize the concrete way of intervention regarding the settlement of individual labor conflicts, in the Romanian legal system, through alternative ways. In full agreement with the previous Romanian legislation and with the examples provided by compared legislation, we consider necessary to establish a conciliation commission for each employer, whose main role will be trying to solve the dispute between the parties in a prior stage before notifying the competent court. It also emphasizes the appropriate legislative intervention in order to rethink the concepts of regulation contained in article 38 of the Labour Code and to increase the possibility of widespread use of mediation in individual labour disputes. The study also highlights the need to correct the legislative gap created by repealing Art. 76 of Law no. 168/1999 on the settlement of labor disputes, which was actually the only norm of labor law which expressly and directly referred to the amicable settlement procedure of individual labor conflicts. The formulated proposals may provide the legislator support in the course of perfecting, at the level of regulation, the process of specialization of labor jurisdiction in the Romanian legal system.

Keywords: the dispute between the parties; specialization of labor jurisdiction; conciliation commission; mediation

1. Introduction

The ways of solving legal disputes, generally, are divided into two categories: traditional ways of conflict resolution and alternative ways of solving them.

ADR understood as *Alternative Dispute Resolution*, or in recent doctrine as Appropriate Dispute Resolution (appropriate methods for solving disputes), is a procedure of solving conflicts, excluding court. Its purpose is to enable parties to choose, to decide one among several ways of solving disputes and responding to

[1] Senior Lecturer, PhD, Faculty of Law, Department of Law and Administrative Sciences, University of Oradea, Oradea, Romania. 26 General Magheru St., Oradea. Phone: 0259 408 105. Corresponding author: laviniachipea@yahoo.com.

the need for "a different kind of justice" based on reconciling the conflicting interests of the parties. (Baias & Belegante, 2002, p. 67)

Regardless of how they are called, these have to establish or re-establish communication between conflicting parties, the nature of these new forms of justice consisting in favor of "*peaceful ways of settling disputes, those ways intended to make the parties agree on the solution and which have in common the intervention of a third party and the removal of the judicial system*" (Jarrosson, 1997, pp. 325-329).

Analyzing these alternative or appropriate methods of solving disputes between individuals, comparing them with each other or especially with the legal proceedings, the fact is underlined that, as the choice is closer to formal methods, parallel with increasing time consumption and resources of resolving the dispute, the control of parties decreases both concerning the procedure and especially the solution obtained, with consequences especially on its efficiency and durability.

2. Amicable Settlement of Individual labor disputes

2.1. Regulations Contained in the Labor Code

On the subject of analysis, if in the case of collective labor conflicts, Law no. 62/2011 regulates conciliation and mediation as methods of settlement, prevention methods are also regulated by the Labor Code in the case of individual labor disputes.

Thus, art. 8 of the Labor Code establishes "*the principle of good faith in the conduct of employment relations*", concerning the performance of the parties' obligations and the exercise of their rights (Athanasiu et al., 2007, p. 8), adding that, for the purpose of their good performance, the participants in legal relationships shall notify and consult each other, in the conditions of law and collective agreements. In fact, the entire regulation, old and current, of employment relationship is based on the *imperative of dialogue between social partners* so that the appeal to court appears as a "last resort" always possible and unrestrained (Dumitriu, 2007, p. 21).

This dialogue between social partners will take the form of one of the following obligations that rests with the employer (Dumitriu, 2007, p. 12): *to inform employees*, the obligation is found in art. 17 of the Labor Code, in article 40

paragraph 2 letter a and d, art. 69 paragraph 2, in Article 70 and 71 of the Code, Article 86, art. 104 paragraph, Article 114 and so on; *consultation of employees* provided by art. 40 Paragraph 2, letter, art.69 para.1 and so on; *to obtain their consent*, provided in article 41, paragraph 1, art. 129, paragraph 1 of the Labor Code etc.

The provisions of Article 38 of the Labor Code expressly set, as we mentioned, that "*employees cannot waive their rights as recognized by law, any transaction in this regard will be null and void*." It results with certainty that the conflicts related to failure of employees' rights under the law shall not be subject to conciliation. Apart from these, however, the disputes between employers and employees can and should be advisable to be settled amicably.

Labor conciliation in doctrine (Elisei, 2002, pp. 57-58) was defined "*as the main way of solving disputes between employees and employers and between civil servants and public authorities (institutions), which have as object either professional, social or economic interests or rights contained in the legal relationship of employment*". Conciliation relations are, according to the same author, related to legal labor relations and are governed, inter alia, by the principle of legal equality of parties which excludes the idea of legal subordination of the employee to the employer, characteristic of employment. The conciliation of work conflicts has a "peacekeeping function", of amicable settlement of disputes with the utmost celerity and decongesting the activity of the labor jurisdiction organ and "a preventive and moralizing function, cultivating good - faith in the legal relationship of employment". (Ignat; Sustac & Danileţ, pp.3-4)

Labor conflict parties are free to enter into an agreement to settle disagreements and configure the contents of this Agreement. The agreement will be achieved by seeking consistent supply of conciliation acceptance of that offer, which can be analyzed by the rules of common law (Ignat; Sustac & Danileţ, pp.62-63).

2.2. Punctual Legal Provisions

An example of provision that encourages the amicable resolution of individual labor disputes is contained in Law no. 202/2002 on equality between women and men. According to the provisions of art. 43 paragraph 1 of the mentioned normative act, "*when employees consider themselves discriminated on grounds of gender, they have the right to submit complaints / allegations to or against the*

employer if the latter is directly involved". Paragraph 2 of the same article also states that, "*if the claim / complaint has not been solved through mediation by the employer, the person who feels discriminated against may address to the court*." It's actually the only situation in which the law expressly establishes in the case of individual labor "a friendly, alternative way, of mediation between the employee and the employer, if the latter is not directly involved. (Stefănescu, 2002, pp.12-13)

2.3. Subsidiary Sources of Law

The possibility of amicable settlement of individual labor disputes finds its source both in a series of legal punctual provisions, referring to the handling of determined conflicts, as well as in subsidiary sources of law (compared to normative acts) governing without the factor of state interference, the procedure for amicable settlement of claims or complaints of individual employees. We refer here to internal rules and provisions negotiated by collective bargaining agreements. The legislator's option for internal rules as subsequent regulation of the legal principle of amicable settlement of individual labor disputes is natural. Out of the two sources of law, "*the collective labor agreement may not be concluded within a given unit, while the internal rules shall be binding on any employer legal person*" (Vartolomei, 2004, p. 15).

The provisions of Art.242 of the Labor Code, which actually brought extra regulation in this area compared to those previously existing, established expressly that *the bylaw binding act for any unit, specific source of labor law, shall regulate the procedure of handling requests or complaints of individual employees. The clauses inserted in the internal rules, pursuant to art. 244 of the Labor Code shall be established by the employer, in consultation with unions or employee representatives, as appropriate. Also, the entire contents of the regulation will be brought to the attention of employees by the employer, coming into effect for employees when they are notified* (art.243 para.1 of the Labor Code).

Thus, most often, in internal rules, the following are covered in detail (Dimitriu, 2007, p. 22): "the body which can be addressed complaints, appeals or requests by employees", "the procedure according to which these will be solved", "the appeal of the decision of these bodies at different hierarchical levels, corresponding to the internal structure of the unit". Also, internal rules will be provided and the way to solve other tensions within the organization, triggered between employees in similar hierarchical positions, working in the same department, and between

employees in relation of subordination. However, if the employees' requests and complaints concern the actual content of internal regulations, they may contact the employer under Art.245 para.1 of the Labor Code, requiring the modification of that provision to the extent that they prove the infringement of a right. The control of legality of the provisions of internal rules is for courts, which can be referred within 30 days from notification by the employer on how to solve the referral made (Top, & Savu, 2003, pp. 58-59).

The inclusion in the internal regulations of such procedures of amicable settlement of individual labor disputes which arise in connection with the rights arising from the employment contract has an important benefit because on the one hand they contribute to satisfying general legal requirements in the field of work conflict, or they try to solve them amicably in order to achieve social peace, and on the other hand, from additional reasons that concern justice.

2.4. Mediation Pursuant to Law no. 192 of 2006 on Mediation and the Profession of Mediator

We consider it appropriate to create a more accurate picture on the possibility of settling labor disputes by agreement, to bring to discussion and to consider mediation.

According to *Law no. 192 of 2006 on mediation and the mediator profession*, come into force on June 8, 2008, *mediation is a way of solving conflicts amicably through a third party as a specialized mediator, in conditions of neutrality, impartiality, confidentiality and with free consent of the parties* (Article 1). Mediation involves "third party mediation proposing solutions to parties, but without being able to impose these" and negotiating with the parties "a project that represents their claims" Thus, "*mediation is the means by which conciliation is reached, and the mediator is paid by the parties*."[1] (Ignat; Sustac & Danileț, p.5)

> Through mediation "*justice is not rendered, in the proper and restrictive sense of the term, a legal dispute is not solved, in the sense of right utterance, but it is only tried to avoid justice, by settling the dispute amicably through exclusive and sovereign will of parties in conflict, with the support, of different intensity… of the mediator*" (Deleanu, 2013, pp. 371-372).

[1] In the French legal system, the judge is the one that means the mediator, coordinate and control its activity, therefore, the mediator is "an auxiliary of justice" (mediation para-judicial).

Thus, mediation is not mandatory but voluntary, the parties must agree to solve the work conflict amicably, the will of one party will not suffice.

But mediation cannot deal with strictly personal rights, such as those regarding the status of the person and any other rights of which the parties, according to the law, cannot decide by agreement or by any other manner permitted by law (Article 2, paragraph 4).

Through the new mentioned law, Article 73 paragraph 2 was amended as follows: "*The provisions of this law shall apply in the mediation of right conflicts, of which the parties may dispose in labor disputes*." It is thus evident the intention of the legislature in 2009 to extend the procedure of mediation to conflicts of rights, to current individual labor conflicts, although the draft of the law is "flawed and ambiguous". Moreover, the provisions of Article 178 paragraph 2 of Law no. 62/2011 on social dialogue expressly provide that for the mediation of individual labor conflicts, the provisions of Article 73 paragraph 2 of Law no. 192/2006 shall apply.

But the question that arises is whether the provisions can be reconciled with those of Article 38 of the Labor Code and which are the categories of conflicts of rights and individual labor conflicts that can be resolved through mediation. We rally to the same doctrinal views which believe that, starting from the meaning of the phrase from *rights recognized by law* to employees, understood as their rights under the law, and by collective bargaining agreements, in the current state of law enshrined to collective bargaining rights, these cannot be reconciled through the use of mediation as a form of amicable settlement of individual labor conflicts. In fact, by accepting mediation in such a situation *a new collective bargaining agreement* would be produced, which would transform a procedure for amicable settlement of an individual labor conflict in a disguised collective bargaining.

If we accept this interpretation of the mentioned rules of law, it is required to identify the issues that concern the employees' rights, which in the event of conflict, may be subject to mediation under the Law no. 192/2006, as amended. Thus, the following can be subject to, based on the agreement of the parties, the amicable mediation procedure: individual labor disputes (former right conflicts) which have as their object individually negotiated rights of employees and given solely on the basis of an employment contract; individual labor disputes aimed at interpreting ambiguous, incomplete clauses in the content of collective or individual employment contracts; labor disputes whose resolution is obtained by

partial or total waiver of the rights claimed by the employer or whose nullity is found amicably, the parties can turn to a mediator to establish the cause of invalidity and the way of disregarding contractual partners; disputes arising in connection with the employees who do not recognize the legality or validity of certain claims of the employer.

Regarding the use of mediation procedure for the resolution of collective conflicts of rights, currently a category of individual labor disputes, we also rally to the mentioned doctrinal opinion that believes that it is only possible under Law no. 192/2006 as amended (Stefănescu, 2010, p. 873) "*if social partners agree to seek mediation by an express clause stipulated in the collective agreement*" or "ad hoc" for each labor dispute and comply with Article 38 of the Labor Code limiting, explicitly and implicitly, the subject of mediation "*to those rights that do not conflict with the law or the terms of the collective agreements concluded at a higher level*."

In any agreement to which the parties may have rights, which includes the analyzed matter taking into account the explanations above, these can introduce a mediation clause, whose validity is independent of the validity of the contract to which it belongs.

The essential role in mediation is granted to the mediator, the profession of mediator can be exercised only by persons who have acquired this quality. (Article 12 paragraph 4)

3. Proposals of *Ferend Law*

Based on the mentioned provisions and in full compliance with relevant aspects of legal practice in the field of work conflict resolution both nationally and in Bihor County, on the opinions expressed in doctrines, on comparative law regulations, we consider appropriate the need of reforming the legal regime on amicable resolution of individual labor disputes in the Romanian legal system.

Thus, we consider it necessary *to include in the Labor Code and the development of special legislation* (Law no. 62/2011 of Social Dialogue etc..), *Collective agreements, internal rules, the legal provisions which establish the obligation to attempt conciliation of parties or, in general, to solve the dispute amicably, a preamble necessary both before and after the onset of the trial court referral.*

Some arguments in support of this proposal are examples given by comparative law.

Thus, for example, in the German legal system, each case brought before the labor tribunal begins with what is called *a conciliation hearing*, which takes place only in the presence of a professional judge, who presides over the court. The result of hearing may consist in the removal of the action, in reaching a compromise or in the establishment of a subsequent date for a hearing confrontation of the parties, held in the presence of the entire panel of judges, including judicial assistants. Even if "the attempt of conciliation fails" (Weiss, 2004), the court, throughout the litigation proceedings that may follow, "shall try to reach an amicable settlement of the conflict.

In the system in UK, one important task of *ACAS (Advisory Conciliation and Arbitration Service) is manifested in the attempt to achieve reconciliation by the parties who have submitted their dispute to resolution by an employment tribunal*. The conciliation process involves assisting the parties to clarify any misunderstandings and try to reach consensus, but the terms of the deal remain the responsibility of the parties. Thus, the court secretary's job is to send to ACAS a copy of the application addressed to the court, the reply or any other relevant document. In this situation, the ACAS conciliation officer will try either at the initiative of one party or on his own initiative to achieve reconciliation of the parties. In general, there is a longer or shorter period, in which the conciliation of parties can be attempted, i.e. 13 or 7 weeks. Parties may refuse to cooperate in the settlement, although the service is free and the talks with the conciliation officer are confidential.

The advantages of conflict resolution through withdrawal in the conciliation stage are undeniable (Deakin & Morris, 2005, p. 80), both for the system itself - such as reducing the costs of the process - and especially for parties, confidentiality, possibility to determine their own terms of settlement etc.

One of the features of Prud'hommes Councils, in the French legal system *is that they are the expression of a conciliatory jurisdiction, with the purpose to ensure the settlement of disputes by conciliation (L 511-1).* Each section includes a conciliation office and a conciliation court (art.511-1) and the attempt of conciliation is the first mandatory phase of prudommal court.

Analyzing the labor jurisdiction of the Romanian legal system, from a historical perspective, we identify legal regulations that contain provisions relating to the

conciliation of individual labor disputes. The Law of 1912 for organizing trades, loan and insurance for workers, provided the establishment of a conciliation commission that would attempt to solve disputes at the unit level. In the period that followed the Second World War, Law no. 711/1946 for the reorganization of labor jurisdiction, regulated the conciliation of labor disputes and later, in 1950 the Labor Code contained provisions on the settlement of individual labor disputes through litigation committees, that usually existed in every unit and were composed of equal numbers of administration representatives (appointed by the management unit) and employees (appointed by the union committee).

Given the many examples offered by comparative law and the specific of individual work conflict resolution in the Romanian legal system, we consider that the mandatory conciliation procedure of the parties of the employment relation should be done with the help of a conciliation commission, made up at the level of the employer.

A similar idea was expressed in the legal doctrine, that it was necessary to constitute a *conciliation commission* in each unit, as optional procedure, not mandatory, in order to address both individual and collective labor conflicts.

We believe, however, that in order to attain the objective pursued by the legislature (Gheorghe, 2010, pp. 430-431) to confer labor jurisdiction a character of specialized jurisdiction, in full consonance with the specific of the legal relation that arises between the parties of an employment relationship, it is necessary to introduce a mandatory conciliation procedure, of conciliation of the parties of the employment relationship, which will leave the way open for the notification of the competent court, in accordance with the provisions of Article 21 of the basic Romanian act, if after its course the parties failed to settle the conflict between them.

Concerning the conciliation commission, which will be constituted by each employer, we believe that it should have a tripartite structure, consisting of representatives of employers, union representatives or elected representatives of employees, when appropriate, with the mandatory participation of the labor inspector, representing the state (Ministry of Labor, in this case), with the role of supervisor, head of the conciliation procedure, without the right to vote, to express a deliberative opinion.

Thus, an arbitration committee would be asked to settle disputes arising between the parties of an the employment relation that are due to either the individual

employment contract or collective agreements or contracts or relations of civil servants, laws or other normative acts, so all individual labor conflicts, according to the new legal regulations.

The specific procedure that will take place within the committee will be included in the special labor legislation, collective work agreements applicable and / or internal rules of each employer. The principle which underlies it is the requirement of attempting to settle the conflict by the understanding of parties that shall establish the terms of the final agreement, creating a durable, efficient, free and mutually agreed solution.

The proposed solution is fully consistent with the theory of conflict resolution of Burton J., according to whom the result of a conflict resolved correctly must be accepted by both parties as a final, permanent solution of the problem (Onica Chipea, 2012, p. 352).

We bring in question, in the context of the ways of solving individual labor disputes amicably, art. 76 of Law no. 168/1999 on the settlement of labor disputes, now inapplicable, stipulating that "on the first day of appearance, before entering the debate, *the court shall make reasonable efforts to reconcile the parties*". Furthermore, based on this legal obligation, the role of the court is conciliatory and reconciliation should be seen as a guiding principle of the whole process and can occur at any stage of its deployment.

Thus we consider necessary an express legislative intervention through the Law of social dialogue that should *reiterate the above rule* because in the absence of such a regulation, the mentioned text being repealed, any obligation of the judge to seek an amicable settlement of the conflict results only from principles guiding labor jurisdiction, which is insufficient. The legal vacuum created by repealing Article 76 of Law no. 168/1999 on the settlement of labor disputes must be corrected, representing in fact, the only safe rule of labor law which expressly refers to the friendly settlement procedure of conflicts of rights, turned into individual labor conflicts.

Along with the reconciliation through this committee, which was to be established at the level of employers, according to the rules above, we consider it necessary, that the legislator focuses on the *procedure, currently voluntary, of mediation pursuant to Law no. 192/2006*. The idea is to correlate the legal provisions of the mentioned act, pertaining to the possibility of using the procedure for the settlement of individual labor conflicts with those of Article 38 of the Labor Code.

Thus, we consider appropriate a legislative *intervention that shall rethink the conception on the regulation contained in Article 38 of the Labor Code, in accordance with the existing doctrinal opinion in legal literature (*Stefănescu, 2004, p. 81; Uluitu, 2009, p. 43, Gheorghe, 2010, pp. 426, 427*).*

To mitigate the effects of Article 38 of the Labor Code and the *increasing possibility of widespread use of mediation in individual labor disputes, in full accord with the letter and spirit of labor laws*, the prohibition established by the mentioned statutory provision for employees should concern only established rights, and not the ones legally recognized, mention that allowed legal doctrine (Athanasiu et al., 2011, p. 290) to interpret broadly the term law, including also applicable collective labor contracts. We mention that such amendments to the text of Article 38 of the Labor Code would be beneficial both in terms of settlement in amicable, alternative way of individual labor disputes, by recognizing the freedom of parties to negotiate and to waive, after negotiation, in whole or in part, the rights established through collective or individual bargaining, as well as the flexibility of employment relations in general. (Gheorghe, 2010, p. 428)

The possibility established for the benefit of participants in the work relation to solve amicably following a mutual, widely accepted, reliable and effective agreement, the disagreements arose during its course, would have the chance to become reality, with compelling benefits for employee, employer and the courts (Onica Chipea, 2012, pp. 353-354).

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