EELA EUROPEAN EMPLOYMENT LAWYERS ASSOCIATION

SUMMARY

2016/29 Prohibition on dismissing union leaders, even for reasons unrelated to union activity, is unconstitutional (RO)

<p>Article 60(1)(g) of the Romanian Labour Code does not allow an employer to dismiss trade union leaders for reasons other than disciplinary misconduct or judicial reorganisation, dissolution or bankruptcy of the employer. The Constitutional Court has recently ruled that Article 60(1)(g) is unconstitutional.</p>

Summary

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Background

Trade unions in Romania

In the first half of 2011, Social Dialogue Law no. 62/2011 was adopted under the impact of the economic crisis, because of the need for labour market flexibility and to satisfy the interests of employers. This has diminished some trade union rights and drastically reduced their power and influence. The measures with the greatest impact are the following:

- At least 15 employees working for the same employer are needed to set up a trade union within an establishment. Previously, 15 employees in the same industry or profession could set

up a union within an establishment even if they worked for different employers. So the legislator has eliminated the option for a trade union to comprise people employed in different establishments, sometimes in competition with each other.

- Under Romanian Labour Law, unions must be 'representative' in order to be able to negotiate and conclude collective bargaining agreements, start collective labour disputes, organise strikes or participate in certain tripartite organisations, for example, the Economic and Social Council. Whether a trade union can claim to be representative normally depends on the number of members it has. Under the previous rules, several different unions set up at the unit level could act as representatives, a solution that hindered agreement to collective bargaining and collective contracts to a certain extent, triggering labour conflicts and resulting in strikes. Under Social Dialogue Law no. 62/2011, only one trade union can act as the representative within a given unit. Social Dialogue Law no. 62/2011 thus limits the ability of employees to associate and organise by making the conditions for being able to be representative more stringent.

- Under the previous law, board members of trade unions were entitled to three to five days off work per month for union activities without salary reduction. Under the current Social Dialogue Law, they no longer benefit from this right.

Alongside the economic crisis, various other factors have also influenced the power of the unions in recent years. The privatisation and liquidation of state companies (which led to a reduction of the number of employees to about five million), lack of focus in the trade union movement and dwindling of interest in the unions all caused a significant decrease in unionisation. At the peak unionisation, in 1993, unionised employees amounted to approximately 70% of the total number of employees. By contrast, currently only about two million workers are union members, which represents a unionisation rate of about 40%.Current efforts by trade unions are geared towards identifying ways to rebuild labour law in a way that unblocks the barriers to obtaining the right to represent, increases social dialogue and assists in agreeing collective bargaining agreements.

Protection of union representatives in Romania

In Romania the protection of union delegates is currently ensured by three provisions:

Article 220(2) of the Labour Code, which prohibits the dismissal of those in elected leadership positions in trade unions for reasons related to union activity.
Article 10(1) of Social Dialogue Law no. 62/2011, which prohibits the amendment and/or

termination of the employment contract of members of trade unions on grounds relating to union membership and union activity.
Article 60(1)(g) of the Labour Code, which is a general prohibition against dismissing trade union leaders for any reason, with the only exceptions being dismissal for a serious disciplinary offence or repeated misconduct and dismissal following judicial reorganisation, bankruptcy or dissolution of the employer.

Thus, trade union delegates cannot be dismissed in cases of, for example, police custody physical and/or mental unsuitability, professional unsuitability or for business reasons generally. Thus, whether or not the dismissal is related to union activity, dismissing trade union delegates is prohibited.

Until now, the Romanian courts have always ruled in favour of union leaders dismissed in breach of the above provisions and employers were obliged to reinstate them and pay their salary retrospectively.

Facts

Mr. Stefan Blacioti was an employee of Goodmills S.A. in Pantelimon, Ilfov County. In 2014 Mr. Blacioti, together with other employees, were informed that they would be made redundant for business reasons. As soon as they learned about their impending dismissal, they went on sick leave, during which time they set up a trade union and were elected to various leadership positions. This meant the employer was unable to dismiss them. Nevertheless, Goodmills S.A. proceeded with the planned redundancies. On 17 November 2014 Mr. Blacioti challenged his dismissal at the Bucharest Tribunal on the basis of Article 60(1)(g) of the Romanian Labour Code.

In July 2015, when the case was pending at the Bucharest Tribunal, the defendant claimed that Article 60(1)(g) of the Labour Code is unconstitutional. The Tribunal decided to refer the matter to the Constitutional Court in accordance with the legal requirements, which state that a court must refer any claim of unconstitutionality to the Constitutional Court, unless the claim is declared inadmissible by that court based on certain criteria regulated by law.

However, the litigation at the Bucharest Tribunal continued until 16 October 2015, when the Bucharest Tribunal dismissed the action as unfounded. We do not know why the action was dismissed because the Court decision was not published. At present the litigation is pending at the Court of Appeal following an appeal lodged by Mr. Blacioti, the next hearing being set for 23 September 2016.

Judgment

Meanwhile, on 24 November 2015 the Constitutional Court ruled that Article 60(1)(g) of the Labour Code was unconstitutional.

The Constitutional Court reasoned that union delegates are in a different position from that of other employees and legal protection is not only justified but necessary in order to avoid possible coercion, blackmail or repression by employers in a way that prevents them performing their function.

Thus, effective protection and sufficient guarantees to allow union representatives to properly perform the duties which they have been assigned are provided by Article 220(2) of the Romanian Labour Code. This prohibits the dismissal of those in elected leadership positions in a trade union for reasons relating to union activity. In addition, Article 10(1) of the Law on Social Dialogue No. 62/2011 prohibits the amendment and/or termination of employment of trade unions members on grounds relating to union membership and union activity.

In this regard, the Court noted that, according Article 1 of ILO Workers' Representatives Convention, 1971 (No. 135) "Workers' representatives in the undertaking shall enjoy effective protection against any act prejudicial to them, including dismissal, based on their status or activities as a workers' representative or on union membership or participation in union activities, insofar as they act in conformity with existing laws or collective agreements or other jointly agreed arrangements."

The Court also referenced Article 7 (titled 'Protection of rights') of Directive 2002/14 establishing a general framework for informing and consulting employees in the EU, which provides that "Member States shall ensure that employee representatives, when carrying out their functions, enjoy adequate protection and guarantees to enable them to perform properly the duties which have been assigned to them". In 2010 the European Court of Justice ruled that Article 7 should be interpreted as not requiring that employee representatives be granted more extensive protection against dismissal than other employees, merely holding that any measures taken for implementing the Directive, whether provided by law or collective agreement, must comply with the minimum protection provided for in Article 7

ECJ 11 February 2010, C – 405/08, Ingeniørforeningen i Danmark vs Dansk Arbejdsgiverforening.

On the other hand, the Constitutional Court noted that by prohibiting the dismissal of union leaders in cases where dismissal is not related to union activity, Article 60(1)(g) contravenes to the following Articles of the Romanian Constitution, thus making Article 60(1)(g) unconstitutional:

- Article 16 on equality before the law – since the establishment of different legal treatment of union leaders, namely the prohibition of dismissal, has no objective and reasonable justification, their protection must operate exclusively in relation to trade union activity actually performed.

- Article 44 on ownership – obligating an employer to continue paying salary to an employee who is redundant and for whom there is no work, or to an employee who, for example, is incapacitated physically or mentally, would amount to "expropriation";

- Article 45 on economic activity – not being allowed to dismiss union leaders (with two exceptions provided by law) would reduce the employer's scope to decide how to organise activity within the company.

As the Constitutional Court's decision is relevant to the pending litigation under Article 60(1)(g), we assume the Court of Appeal will uphold the Bucharest Tribunal's ruling and reject Mr. Blacioti's claim.

Commentary

It is worth mentioning that under the legislation in force until 2011 the prohibition against dismissing union leaders currently regulated by Article 60(1)(g) applied not only during the term of office but for a further two years after termination of the mandate. This was a considerable burden on employers, especially during the economic crisis when large scale redundancies where often the only option.

The overprotection of union leaders was softened in 2011 when the protection against their dismissal was limited to the duration of their mandate. The restriction of their protection has reached its peak with this new decision of the Constitutional Court and the aim of employers that union leaders should only enjoy protection related to their union activity has finally been achieved.

In my position as an attorney-at-law who mainly represents employers, I can only embrace the legislative changes. I have experienced how, in the past, the excessive and unjustified protection against dismissal has often led to abuse, whereby union members were elected to leadership positions simply to avoid dismissal. In addition, employers were often prevented from implementing business restructurings by the restrictive legal provisions relating to the dismissal of union leaders. The decision of the Constitutional Court not only meets ILO and EU requirements on adequate protection, but is also in line with business practice.

Nevertheless, the battle of trade unions for power and immunity is not over. A series of legal projects was launched last year, one of them aimed at amending Article 10(1) of Social Dialogue Law no. 62/2011 by reinstating the prohibition against dismissal of union leaders for reasons not related to them (e.g. business reasons) or for professional unsuitability during their mandate and two years following the termination of the mandate. On 10 May 2016 the Chamber of Deputies approved the Bill. The vote of the Chamber of Deputies is final. However, before promulgation of the law, the President may refer it back to Parliament for reexamination. On 6 June 2016 the President did precisely that, based on the Constitutional Court's decision. The law is currently being reexamined by the Senate.

Comments from other jurisdictions

Austria (Erika Kovács, University of Vienna): In Austria union leaders are not allowed to be dismissed for their union activities. Dismissal based on joining a union, being a member or engaging in union activities are protected. A union leader or member of a union simply has just to present a credible case that one of these was likely to have led to the decision to dismiss and the employer then must try to prove the contrary.

There is similar protection for other employee representatives.

For example, dismissal for activities as a member of a conciliation board or occupational physician, or an application for membership of a works council – or even former membership of a works council – are all prohibited reasons for dismissal.

Works council members, however, enjoy greater, extended protection. A member of a works council may be dismissed only with the prior permission of the court. If an employer gives notice to a works council member without the prior permission of the court, the dismissal will be void. The permissible reasons for ordinary and extraordinary dismissals of works council members are expressly set out in law.

The reason for the higher level of protection of works council members is that they work at the level of the enterprise and cooperate directly with the employer and are therefore more dependent on it. By contrast, trade unions in Austria usually operate at branch level.

Germany (Paul Schreiner and Jana Hunkemöller, Luther Rechtsanwaltsgesellschaft mbH): The situation in Germany differs from that described above. Union leaders do not enjoy any special protection. They can be dismissed in the same way as any other employee. However, usually they are employed by the union itself. Union representatives operating within an undertaking have the same protection from unfair dismissal as any other employee but may not be disadvantaged as a result of their work for the union, as termination for union activities

is not permitted.

Special Protection comparable to that described in this case is granted to members of the works council. By Section 15, paragraph 1 of the German Dismissal Protection Act (Kündigungsschutzgesetz, 'KSchG'), works council members can only be dismissed for cause without notice where the cause is not related to the individual's work in the works council, for example, persistent misconduct or a serious disciplinary offence. In the case of closure of the business or unit, they may only be dismissed if they cannot be transferred to a different unit (Section 15, paragraph 4, 5 KSchG).

Subject: Dismissal of trade union leaders

Parties: Goodmills S.A. – v – Bucharest Tribunal

Court: Curtea Constititionala (Constitutional Court of Romania)

Date: 24 November 2015

Case number: 1.268D/2015

Publication: https://www.ccr.ro/ccrSearch/MainSearch/SearchForm.aspx

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Creator: Curtea Constititionala (Constitutional Court of Romania)
Verdict at: 2015-11-24
Case number: 1268D/2015