

SUMMARY

2016/56 Constitutional Court prohibits suspension pending disciplinary investigation (RO)

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Background

Pursuant to Article 52(1)(a) of the Romanian Labour Code, the employer may suspend an employee during a disciplinary investigation without pay. The disciplinary investigation must take place within six months of the date of the events leading to it, meaning that the maximum time the employee can be suspended for is also six months. The aim of the provision enabling suspension without pay was to protect the interests of the employer. In a similar way, an employer is also allowed under Article 52(1)(b) to suspend an employee against whom it has filed a criminal complaint without pay. However, on 23 April 2015 the Constitutional Court ruled Article 52(1)(b) unconstitutional, as it infringed the proportionality principle. It was found to be disproportionate, as the employer both files the criminal complaint and then because of the complaint's existence, decides to suspend the employee, meaning that the suspension is entirely at the employer's discretion. The Court found this to be potentially abusive.

Facts

This case concerns COMCEREAL S.A., which suspended two of its employees, Nicolae Nica and Andi Vlad Laurențiu, who were under disciplinary investigation, in accordance with Article 52(1)(a) of the Romanian Labour Code. The judgment does not reveal what the employees were alleged to have done.

On 22 January 2015 and on 3 April 2015 respectively, the two employees challenged their suspension at the Braila Tribunal by claiming Article 52(1)(a) of the Labour Code was unconstitutional.

The defendants claimed, essentially, that the employer's unfettered ability to suspend them during the disciplinary investigation was unfair. The decision to do so was entirely at the employer's discretion and not subject to any objective criteria. In October 2015, when both cases were pending at the Braila Tribunal, the Tribunal decided to refer the matter to the Constitutional Court in accordance with a legal requirement to do so where there is a claim of unconstitutionality.

The litigation at the Braila Tribunal continued until 13 January 2016 and 29 January 2016 respectively, when the Braila Tribunal dismissed both actions. We do not know why the actions were dismissed because the Court decisions were not published. Nevertheless, the ruling of the Braila Tribunal is consistent with Romanian court practice at that time on the suspension of employees during a disciplinary investigation. No appeal has been lodged at the Court of Appeal by either of the two employees.

However, following the disciplinary investigation COMCEREAL S.A. proceeded to dismiss both employees. The employees again made claims to the Braila Tribunal. This time the Court ruled in favour of the employees. The decision of the Braila Tribunal has also since been upheld by the Court of Appeal. Both Nicolae Nica and Andi Vlad Laurențiu were entitled to reinstatement, as well as to retroactive payment of all salary rights from the date of dismissal.

Judgment

Meanwhile, on 5 May 2016, the Constitutional Court ruled that Article 52(1)(a) on suspension during a disciplinary investigation was unconstitutional.

Given that the suspension of an employee limits the exercise of his or her right to work, the Constitutional Court held that the employer must consider whether the restriction is reasonable and proportionate to the objective pursued. The Court suggested the following assessment to determine this and applied it to the case at hand:

- Is the suspension justified by a legitimate purpose? The Court considered that there needed to be a legitimate reason for the suspension, based on protection of the employer's legal and constitutional rights.

- Is the suspension appropriate or required for the purpose? The Court stated that the suspension of an employee is appropriate where the employee's continued active employment would be likely to be harmful to the employer's economic activity and affect the rights and interests of the employer. The Court considered that the employer should have the right to suspend the employment contract if it considers its interests would be affected by continued employment, as this is necessary to ensure the effective protection of the employer's rights and interests.

- Does it maintain a fair balance between the rights and interests of the employer and employee in a way that is appropriate to the aim pursued? The Court found that the test of proportionality was not met in this case, when the employee's right to work was restricted by suspension, as suspension was excessive compared to the objective to be achieved. This meant that Article 52(1)(a) on suspension during a disciplinary investigation was unconstitutional under Article 53 on the restriction of certain rights and freedoms. This Article infringes fundamental rights laid down in Articles 41(1) and 21 of the Constitution concerning the right to work and free access to justice, respectively. To emphasise the importance of the fundamental right to work, the Court referred various international treaties to which Romania is a signatory. The right to work is contained in Article 6(1) of the International Covenant on Economic, Social and Cultural Rights, which provides that "the State Parties to the present Covenant recognize the right to work, which includes the right of all to have the opportunity to earn a living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right." Moreover, Article 23(1) of the Universal Declaration of Human Rights states that "everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment". Article 15(1) of the Charter of Fundamental Rights of the European Union stipulates that "everyone has the right to engage in work and to pursue a freely chosen or accepted occupation".

Thus, to suspend the employment contract, the only condition that the employer has been required to observe up to now is to commence a disciplinary investigation against the employee. Moreover, Article 52(1)(a) does not impose a time limit and therefore the suspension may last for up to six months.

In addition, even though by Article 52(1)(a) the legislature intended to prevent harm to the employer, potential harm to the employer is not an express condition for suspending the employment contract. Therefore, there is nothing to prevent the employer from suspending

the employee, even if continuing the employment during disciplinary proceedings has no negative effect on the employer in practice.

Further, Article 52(2) goes on to state that if no finding is made against the employee in the disciplinary proceedings, the employee has the right to resume his or her job and be paid compensation equal to the salary and other rights owed for the period of suspension. However, if a finding of fault is made in the disciplinary proceedings, no matter how minor, the employee will not be entitled to claim back-pay for the period of suspension and so it is possible that the effect of the suspension can end up being harsher than the penalty for the fault.

In this context, the Constitutional Court considers that because of the lack of objective criteria that the courts can use to analyse the legality of a suspension issued by an employer, the right of free access to justice under Article 21(1) of the Constitution becomes, in fact, only a notional right for the employee.

Commentary

A prohibition against suspending an employee during a disciplinary investigation may pose a practical risk to the employer or work colleagues, as an employee is usually suspended to avoid others involved in the investigation feeling intimidated while it is conducted, or to stop evidence being corrupted. To this extent, it would have been preferable for Article 52(1)(a) not to have been deemed unconstitutional. On the other hand, as there are no objective criteria that must be met before an employer can decide to suspend an employee under Article 52(1)(a), it was entirely at the employer's discretion and this did not provide sufficient guarantees of proportionality between the need to protect the employer's interests and the rights of the employee.

Nevertheless, it might have been better if the law had been amended to allow the employer to suspend, for example, in cases of gross misconduct involving violent behaviour – rather than having the matter end up in the Constitutional Court. Suspension on full pay might also have been a feasible option.

Comments from other jurisdictions

Croatia (Dina Vlahov Buhin, Schoenherr): The Croatian Labour Act does not specifically regulate employers' ability to suspend employees for misconduct during a disciplinary investigation. The possibility of suspension is explicitly mentioned only in respect of the employer's obligation to consult with the works council about decisions that are important for jobs (in particular, in relation to an extraordinary dismissal with which the works council

disagrees).

The suspension of employees during disciplinary proceedings could however be required by the internal regulations of the employer. In any event, if an employer suspends an employee during disciplinary proceedings, we believe that the employer would not be in breach of Croatian law, as long as there is a justifiable reason for the suspension and the employee receives his or her full salary during the suspension.

On the other hand, in my opinion, having an explicit provision in the Labour Act giving employers the option to suspend an employee without pay during disciplinary proceedings would benefit employers and probably reduce the number of claims for the courts to declare terminations unlawful. However, introducing this in Croatia would need to be done in a way that balanced the interests of the employer with the justified purpose of the suspension. I would agree with the Romanian comment that such rules must allow the employer to freely decide to suspend – but only on the basis of serious allegations against the employee, such as, for example, gross misconduct.

Hungary (Peter Ban, CMS): Before Act I of 2012 on the Labour Code of Hungary came into force the suspension of an employee (with or without pay) was a disputed and very sensitive area of employment law. The previous Labour Code (Act XXII of 1992) did not clearly provide employer with the option to suspend employees during a disciplinary investigation, but did not clearly prohibit it either. Therefore, when suspended by an employer, employees tended to claim that their constitutional right to work has been violated and claim damages. The courts struggled to adjudicate these disputes. Most employers paid compensation so as to avoid future claims at least on salary and so as to be able to argue that no financial harm had been done by suspending the employee and there was therefore no basis for damages.

The new Labour Code, however, cures this ambiguity by clearly providing in Section 55(2) that the employer has the right to suspend an employee in the event of an investigation for an alleged breach of the employee's obligations. The new Labour Code has introduced guarantees in relation to this, however, in order to protect the rights of employees. The suspension may only be for the duration of the investigation, or a maximum of 30 days. During the suspension, the employee is entitled to an 'absence fee', which in practice means full pay. Based on court practice, the suspension cannot violate the personal rights of the employee and so employers must ensure to act carefully so that its actions do not damage the employee's reputation and human dignity. Nevertheless, suspension alone is not sufficient for an employee to claim damages for breach of personal rights.

Compared to the Romanian practice, the Hungarian rules are more restricted and probably

more balanced in terms of employees' rights to work and freedom to choose an occupation (though freedom to choose an occupation should not be affected by suspension as such). The Romanian rules went beyond what is permitted under Hungarian law in terms of the shorter time limit and the fact that employees are not entitled to pay. In my view, this goes too far and is not a proportional restriction but I agree that if the employer had no right at all to suspend employees, that may make it very difficult for it to conduct disciplinary investigations. In Hungary, suspension is used in almost all cases where there is an internal investigation. If no suspension were possible, this would not permit the employer to carry out an internal investigation even if was a serious disciplinary concern, such as an allegation of fraud. However, new legislation with a better balance, more objective criteria and a rule enabling some form of compensation during the suspension may still be needed.

Finland (Kaj Swanjung and Janne Nurminen, Roschier Attorneys Ltd): The current Finnish Employment Contracts Act (55/2001, as amended), does not provide the employer with a statutory right to suspend an employee without pay as a disciplinary measure, although such a right has existed in the past. It should be noted that some collective bargaining agreements have provisions making disciplinary lay-offs an alternative to termination or cancellation of the employment on grounds related to the employee's breach. The statutory right to lay off an employee applies only to financial or production-related situations.

The legislation does not prevent concluding a mutual agreement on temporary suspension without pay as an alternative to termination of employment, based on a breach of the employee's duties. It is questionable how often such a situation would occur in practice, however, as if an employee had breached his or her duties in a way that entitles the employer to terminate the employment, this normally means it is unlikely the employer would be interested in continuing the employment relationship, since trust has presumably broken down.

In practice, where there is an internal investigation in Finland, the employer will protect its interests and manage the employee's misconduct by conditionally releasing the employee from his or her duties during the investigation. During the release the employee is still entitled to full salary.

Greece (Elena Schiza, KG Law Firm): Unlike the Romanian Labour Code, Greek labour law does not allow for the suspension of an employment contract in the case of a disciplinary investigation against an employee. The employment agreement remains in force and binds both parties during the investigation and the employer must continue to pay the agreed salary to the employee. In practice, during the investigation, the employer will often grant paid leave to the employee until it is complete. By Greek law, the employer may terminate the

employment agreement without prior notice and without paying the statutory severance if a criminal complaint has been made and/or prosecution has commenced against the employee for an offence committed by the employee whilst performing his or her duties.

Austria (Christina Hiessl, Yonsei University): In Austria, the employer would be well advised to pronounce a 'conditional dismissal' as soon as the suspicion of the employee's misconduct arises. It could release the employee from all activities in the enterprise while continuing to pay the wage, but expressly reserve its right to claim back all wage payments made from that point later on – provided that the disciplinary proceedings confirm the suspicion. This practice, which is recognised by constant jurisdiction, guards the interests of both parties: the employee is not immediately deprived of the entitlement to income, but is obliged to reimburse the employer later in case the dismissal was in fact justified. The employer in turn does not have to put up with the presence of an employee whose trustworthiness may be doubted pending the outcome of disciplinary proceedings. Needless to say, the employer has to ensure that this intent of only conditional wage payment is communicated to the employee at issue in an unambiguous manner.

Subject: Right to work, suspension without pay

Parties: COMCEREAL S.A. – v – Brăila Tribunal

Court: Curtea Constitutionala (Constitutional Court of Romania)

Date: 5 May 2016

Case number: 1.778D/2015 and 157D/2016

Internet publication:

<https://www.ccr.ro/ccrSearch/MainSearch/SearchForm.aspx>

Creator: Curtea Constitutionala (Constitutional Court of Romania)

Verdict at: 2016-05-05

Case number: 1778D/2015 and 157D/2016