SUMMARY

2019/11 Resignation or constructive dismissal? (RO)

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Facts

The claimant/employee had been employed as a sales representative by the defendant/employer since 2009. In May 2014, he was promoted to a key sales representative position. The employment relationship between the parties was good until 2016 when a decline in the employee's job performance occurred due to a personal issue, a divorce. The decline in performance caused several arguments between the employee and his supervisor, as the latter found that the employee had neglected his portfolio of clients.
In this context, according to colleagues of the employee (acting as witnesses during the procedure), the company's representatives requested the claimant's resignation on various occasions. Furthermore, during a meeting held on 26 April 2016 the employee's superior was abusive and dictated to him a resignation letter which was not, however, signed at that time. After this meeting mobbing of the employee continued by text messages, conversations, screaming, isolation, and limiting access to various opportunities, etc. As a result of all the mobbing actions on the employee, he resigned in September 2016 with effect from 1 November 2016. After submitting to the employer his written resignation, the employee

informed the company's representatives (i) that his resignation was repeatedly requested by his superiors, (ii) about the stress he was subjected to, and (iii) that his accord on the termination of the individual labour contract was obtained by abusive conduct after nine months of continuous mental harassment. However, the company reacted in a very formal way by merely stating that they did nothing but acknowledge his resignation, without offering him a proper and complete solution.

Legal background

On 15 December 2016, the employee started proceedings against his employer before the Iasi Tribunal – Division of Labour Disputes and Social Security. His primary claim was to annul the resignation. The accessory claims were for the company to reinstate him in the position he had previously held and payment of all (indexed, increased and updated) salary until the moment of reinstatement. He also claimed damages to repair the moral prejudice he had been subject to.

Judgment

As the Romanian Labour Code does not regulate constructive dismissal, the 'regular' Civil Code provisions applied. These stipulate that a consent cannot be given by error, wilful misconduct or as a result of violence.
The Iasi Tribunal held that general forms of mental/physical violence making consent defective acquire particular meanings in the labour law legislation. For example, violence equates to harassment, a well-established term at national and European level. By way of reference, Article 2(3) of Directive 2000/78/EC (Framework Directive) defines harassment as:

Harassment shall be deemed to be a form of discrimination [...] when unwanted conduct related to any of the grounds referred to in Article 1 takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment.

This Article was transposed into Article 4(d)(1) of Law no. 202/2002 on the equality of opportunity and treatment between women and men, which defines mental harassment as:

Any inappropriate behaviour which takes place over a period of time, is repetitive and systematic and involves physical behaviour, oral or written language, gestures or any other intentional acts that may affect a person's personality, dignity or physical and mental integrity.

As the claimant's resignation was vitiated by 'violence' (namely the mobbing acts he was subjected to) the Iasi Tribunal ruled in his favour and declared the resignation null and void.

Subsequent to this decision, the Court obliged the employer to reintegrate the employee into his original position and pay him all the indexed, increased and updated salary and any other rights he would have been entitled to.
Additionally, the Court stated that, according to the case file, the employer's actions caused the claimant immense stress which affected his dignity. In line with Article 253(1) of the Romanian Labour Code which states that

the employer [...] is obliged to refund the employee when the latter suffered a moral or material prejudice caused by the employer while fulfilling its job attributions [...],

the Iasi Tribunal obliged the defendant to pay the amount of Romanian lei 10,000 (Euro 2,127) in damages for the moral prejudice suffered.
The Tribunal's decision was challenged by the defendant at the Iasi Court of Appeal. The latter upheld the Tribunal's decision in its final decision dated 15 May 2018, without any additional arguments.

Commentary

Constructive dismissal or contrived resignation is indirect dismissal of the employee based in particular on fraudulent action by the employer obliging the worker to resign. By covering up the dismissal the employer evades the legal arrangements which should have applied, namely either the legal procedure for disciplinary dismissal or the legal procedure for poor performance, as might have been the case.
However, it is to be said that not any kind of reproach linked to the employee's activity may represent a mobbing act that may lead to a constructive dismissal. So, there is a thin line between a constructive reproach and harassment. Courts have repeatedly held that routine actions by which the manager is critical (firmly but constructively) of the work performance of his/her team members as well as cases where managers assign tasks which fall within his/her right to give instructions and exercise control over the performance of duties are not considered to be actions of harassment.
The concept of constructive dismissal is unknown in the Romanian legislation and this lack of regulation gives rise to major difficulties linked to the burden of proof.
Nevertheless, it is worth mentioning that the Romanian legislation regarding harassment at work has made great progress over the past decade, in which the EU Legislation has played a significant role. Directive 2000/78/EC (Framework Directive) was first transposed into the Romanian legislation in 2000. Until transposition of the Framework Directive, the concept of harassment applicable in employment relationships was not regulated in the legislation. Harassment was merely regulated as a general criminal offence by the Romanian Criminal Code.

Thus, even if this concept of 'constructive dismissal' is not expressly regulated by the Romanian legislation currently in force, the Romanian courts of justice successfully apply it. They partially manage to complement a legislative void, by relying on the constantly evolving Romanian legal framework on harassment at work, in conjunction with the European legislation and the European Court of Justice's decisions for a better understanding of its applicability.
Additionally, the regulation of harassment at work has given rise to a large number of court cases over recent years due to the fact that employees have decided to claim their rights since understanding that some employers' behaviour is considered to be abusive.
Thus, in order to avoid similar behaviour and subsequent abuses, both by employers and employees, the Romanian regulator should expressly regulate the concept of 'constructive dismissal' and transpose it in the Labour Code. Nevertheless, the regulation of constructive dismissal without specifying clear assessment standards and the consequences of non-compliance would not ensure active prevention and equitable punishment of potential abuses.
In conclusion, unless there is clear and predictive legislation, both employees and employers will not be in a position to be aware of their rights and the ways to exercise them.

Comments from other jurisdictions

Germany (David Meyer, Luther Rechtsanwaltgeschellschaft mbH): The Romanian decision seems very much in line with the legal situation and case law in Germany. German courts would have come to an equivalent decision.
Directive 2000/78 has been implemented into German law by the General Act on Equal Treatment (*Allgemeines Gleichbehandlungsgesetz* or 'AGG'). The AGG prohibits and sanctions mobbing and sexual harassment at the place of work as well. The AGG focusses – as it seems to do in Romania – not only on forbidden conduct of the employer but also on the employee's conduct. As the employer is usually regarded as the superior party in the employment relationship(s) it is responsible and liable for misconduct of its employees against victims of discrimination.
In Germany an employee that has been forced to sign a mutual termination agreement or to give notice may challenge their declaration and claim continuation of their employment relationship. They may additionally claim compensation and damages (Article 15 AGG).
In a recent decision the German Federal Labor Court stated as well the obligation of both employment contract parties for just and fair negotiation (judgment of 7 February 2019, 6 AZR 75/18). The decision was based on a similar situation to the Romanian case. The employee signed a termination agreement with the employer's representative, which provided for the immediate termination of the employment relationship without any compensation payment. She later claimed that her employer took advantage of her being sick when signing the

contract; she challenged the agreement. The Court held that the employer violated its duties when it caused significant psychological pressure preventing a free decision by the employee on the conclusion of a termination agreement ('undue influence'). The employer then has to reinstate the employee in their position and continue the employment relationship. As in the Romanian case the employee may even be entitled to compensation payments and damages.

Italy (Caterina Rucci, Katariina Gild): Under Italian law, several different remedies might apply in a case like this.

Section 2113 subsections 1-2 of the Civil Code would allow the employee to challenge and bring a claim within six months against their own resignation, provided this is considered as a renunciation of mandatory legal rules: however, since the employee has the right to resign anyway, this might not be the best remedy.
Constructive dismissal is also an available remedy, under section 2119 of the Civil Code, should what have happened be considered as something preventing the continuation of employment: this remedy, however, in comparison with cases of discriminatory or void terminations, would entitle the employee to get the their notice period indemnity paid to them, which is a quite a poor remedy in comparison with the other ordinary ones.
Should the behaviour of the employer be potentially connected to health problems (connected either to the mental or physical state of the employee), a labour court might allow reinstatement for discrimination (with the employee having the choice of a 15 months' indemnity, while damages equal to lost remuneration would be given in addition either to reinstatement or to the 15-months' indemnity).
Should pressures on the employee and/or the behaviour of the employer in general be deemed to be violent or a fraud specifically intended to cause resignation, this might be a case of void resignation, however, this places a quite difficult burden of proof on the employee.
Pressures on the employee might also make the resignation void, and the consequent right of the employee to a continuation of employment and payment (also in absence of any working activity after the decision) but without the right to the intermediate remuneration since this kind of invalidity has no retroactive effect.
In a case like this, therefore, in Italy it should be carefully checked which of the remedies has more opportunity of being allowed, considering the requirements and the burden of proof rules for each of them.

Finland (Janne Nurminen, Roschier, Attorneys Ltd): In Finland, the termination of an employment contract by the employer is regulated by the Employment Contracts Act (55/2001, as amended). According to the Act, the employer needs a proper and weighty reason to terminate an employment contract. The employee can terminate the contract without any

grounds for notice but in compliance with the applicable notice period. If the contract is terminated by the employee, it is considered as a resignation. The Employment Contracts Act does not recognise the concept of 'constructive dismissal'.
Although a doctrine of constructive dismissal is not recognised by law in Finland, the concept is not foreign to courts and other authorities. The courts would assess the situation as a whole. As such, if the employee was able to prove that they terminated the employment contract as a result of harassment and bullying by the employer, the court could find that the termination of employment is attributable to the employer. Additionally, the employer could be held liable to pay compensation for an unlawful termination.

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