

The Liability of the Employer and the Liability of the Employees between Civil Law and Labour Law

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Abstract. *The working relationships based on the individual labour contract have an unprecedented aspect in civil law, namely, inequity of parts during the performance of the contract. This inequity is transposed in theoretical and applicative plan by the existence of the subordination report between the employer and employee. The lack of balance of the forces between the two parts of the contract constituted the necessary element for the birth of the new law branch which, by its settlements, to compensate this drawback. Though, in matter of liability, this “law of inequity” does not distinguish as a creator of new and independent institutions from “the general law”, apparently confining only at the removing or compensating the premises of the parts inequity. Thus, the Romanian labour law create a specific institution named patrimonial liability which involve applicable rules in the legal relationship arise from the individual labour contract that represent an exception from the common rules of the civil liability but does not completely delimit from it and using it as a decipherer resource of its elements and as supplement resource.*

The patrimonial liability does not exclude in all the situations the co-existence of other forms of civil, contravention or criminal liability if the necessary elements for their incidence occur.

Keywords: liability; employer; employee; labour law; civil law; patrimonial liability; civil liability; contract.

JEL Code: K31.

REL Code: 12E.

Introduction

The terminology used in the matter of the liability specific to the labour law has a technical character strictly defined by the Labour Code, Law no. 53/2003⁽¹⁾, and by its related laws; therefore I consider that is necessary to define the essential terms in this way:

1. We define the individual labour contract as the agreement of the will between the employee and the employer by which, in exchange of the wage payment, the first obliges oneself to perform the labour for and under the authority of the second. Art. 10 of the Labour Code defines the individual labour contract as the contract on the basis of which an individual person, named employee, obliges himself to perform the labour for and under the employer's authority, individual or legal person, in exchange of a remuneration named wage.
2. The employer is defined by the Labour Code in the art. 14: "(1) In the meaning of the present code, by employer is understood the individual or legal person which can, according to the law, to employ labour force based on individual labour contract. (2) The legal person can close the individual labour contract as employer from the moment of gaining legal personality. (3) The individual person gains the capacity to close individual labour contract as employer from the moment of gaining the legal capacity⁽²⁾. Taking into account also the legal provisions of art. 230 of Labour Code we specify that "the owner, named in the present code employer, is the legal person registered or an authorized individual person according to the law, which administrates and utilizes the capital, regardless its nature, with the purpose of profit obtained in competing conditions and which employ wage labour".
3. The wage-earner or employee is defined as being that individual person which in the basis of an individual labour contract is obliged to perform labour for and under the authority of an employer, individual or legal person, in exchange of a remuneration named wage⁽³⁾.
The labour law separates from the big branch of civil law as a necessity of new times that evince increasingly the equality of the parts in the legal report. Either this equality is initially related only to the equality among peoples or subsequently is specifically related to its area of settlements.
4. The contractual civil liability represents the debtor's obligation duty arisen from a contract to repair the prejudice caused to its creditor by the fact of non-performing *lato sensu* the due service. By non-performing *lato sensu* the obligation is understood its delayed performing, the inadequate

performance or the non-performance itself, complete or partial (Pop, 1998, p. 177).

5. The mutual patrimonial liability of the parts of the labour legal report and the employer and employee, respectively, results from the individual labour contract, has a remedial character and it is based on “rules and principles of the contractual civil liability”, accordingly to art. 269 paragraph 1 and art. 270 paragraph 1 of Labour Code. The general rules of this liability are those from the common law which rules the contractual civil liability to those adding the specific rules contained in Labour Code (Ștefănescu, 2007, p. 480). By inserting those articles, 269 and 270, the lawgiver removed the old “material liability” settled by the former Labour Code, which, we can state, it was a liability different from the contractual civil one.

Therefore devolve upon the employer a liability with remedial character based on the rules of the contractual civil liability but different from it by the particularities of the employment relationship specificity. We can state that this type of liability represents just a variety of contractual civil liability, in both situations the prejudice being caused by the violation of an obligation assumed by contract.

The patrimonial liability of the employer or the employee singularizes by the following elements:

1. Can result only in the presence of a valid individual labour contract closed, therefore being a contractual civil liability with some exceptions⁽⁴⁾;
2. It is an individual liability, can arise only in the employer’s task or guilty employee, in connection with performing the individual labour contract;
3. The solidarity of the parts found guilty is not accepted and in situations in which at the producing of the prejudice have participated more persons, the remedial obligations of the prejudice what devolve upon each are conjunctional, sometimes subsidiary and common, but not solidary (jointly)⁽⁵⁾;
4. Is a complete liability which cover both the actual produced damage (*damnum emergens*) and the unfulfilled benefit (*lucrum cessans*); both the employer and the employee answer only for the caused prejudice which was appointed or predictable in the moment of closing the individual labour contract, except the severe guilt assimilated to fraud (according to art. 1085 of Civil Code), when they will answer also for the unpredictable prejudice (Moțiu, 2009, p. 352);

5. The mend of the prejudice is accomplished by pecuniary equivalent. In case of the employer liability there are no exceptions from this rule, but, in case of the employee there are, beside the situation in which the prejudice is recovered by wage restraining and exceptions⁽⁶⁾;
6. As regards the presumption of guilt of one of the parts, matter which the Labour Code does not settle specifically, we can state that if such presumption can not be opposed to the employee⁽⁷⁾, because of the fact that he has a duty of best efforts, similar presumption can be opposed to the employer because of the fact that he has a duty to achieve specific results. This relative presumption can be turned over by the employer by proving the fact that his obligations didn't fulfil because of the non-attributable fact.
7. In case of disagreement of the parts over the existence and extent of the liability, competent court is called to establish these aspects.
8. Judicial enforcement has a limited character regarding the patrimonial liability of the employee⁽⁸⁾ and it is unlimited regarding the patrimonial liability of the employer, there are no legal restrictions.
9. The clauses of aggravation of the employee are purposefully forbidden by the legal stipulations.
10. Alongside the clauses of remedial non-liability from civil law is also frame the one regarding the normal risk of the employment, according to art. 270 paragraph 2 of Labour Code.

The specificity of the patrimonial liability of the employer toward the employees

According to art. 269 of Labour Code the employer is obliged, based on the rules and principles of the contractual civil liability, to compensate the employee if he suffered a material or moral prejudice because of employer's guilt during the fulfilment of his employment duties or related to the employment. If the employer refuses to compensate the employee, the later can address a complaint to competent courts. The employer which pays the compensation will recover the appropriate amount from the employee guilty of causing the damage, in accordance with article 270 and follow-up.

Being a particular application of contractual civil liability for the mobilization of the employer liability towards his employees, all the terms of the contractual liability must be fulfilled, regarding the illicit act, prejudice, causal relationship between the wrongful act and prejudice, employer's guilt.

The remedy of the prejudice caused by the employer to the employee must be complete, so the employer answer for the material or moral prejudice; for the actual damage and for the non-accomplished benefit; for the predictable prejudice or which can be predictable at the moment of closing the individual labour contract, except the severe guilt (employer's fraud), for a complete or partial non-performance, an inadequate or delayed performance of his duties.

In the same time, towards the requirement of the complete remedy of the prejudice, the employer is obliged to pay the owed compensation as well as to pay the legal interest (according to art. 1088 of Civil Code), from the day of placing the request of the proceeding (date from which is considered in default, according to general rules).

The employer answer for the certain prejudice caused to employee (whose existence is sure and extend can be established), but not for the possible or future prejudices. Expressly, although we are on the contractual field, where the remedy by pecuniary equivalent of the non-patrimonial prejudices has a small area of application (i.e. in the contracts of public conveyance, of copyright and inventor rights exploitation), towards the stipulations of the article I of the Law no. 237/2007⁽⁹⁾, we must ascertain that the employer it is incumbent to remedy totally also the non-patrimonial prejudices, to the extent that occurred to the employee.

The most common situation that raises the issue of the employer's liability towards his employee can occur when:

- by court order is cancelled the decision of employee dismissal prepared by the employer, the later being obliged to pay compensations;
- the employee is prevented in any form to work;
- found criminal innocence of the person suspended from office and its compensation is due;
- the wage is not paid at the terms and in the manner agreed or take place unjustified delays regarding the payment of owed wage accordingly to the art. 161 paragraph 4 of Labour Code;
- the holiday entitlement and the right to the breaks of the employee, considered natural during working is not respected;
- the employee is dispossessed of the working equipment or his personal equipment/things because of the employer's lack of proper security measurements;
- the necessary documents which arise from and certified his quality of employee are not released to the employee, followed by the generation of some prejudices in his patrimony (i.e. the impossibility to take a job at other employer or to contract loans or bank credits) etc.

Constitute clauses of contractual non-liability of the employer the ones existing also in the common law, force majeure and unforeseeable circumstances, respectively, specifying that, in principle, in matter of contractual civil liability does not exist differences of the effect between them. If the employer proves that non-fulfilment of his duties, according to the law and those negotiate with the employee, is due to the force majeure or fortuit event, the condition of the liability regarding the causality between the illicit act and the damaged caused is no longer met, in which case the employer's liability can not established.

The effect produced aims the obligation ceasing whose performance become impossible as they act during the force majeure or the fortuitous event (since this is a contract of successive performance, force majeure and fortuitous event act temporarily).

We observe the discriminating character of the law in matter of patrimonial liability of the employer to its employees (to employer disadvantage) that settle the employer right to recover the due amount of the paid compensation from the employee responsible for the damage, according to art. 269 paragraph 3 of the Labour Code corroborated with the one which states that court orders pronounced in first instance by the tribunal are final and enforceable by the law, according to art. 289 of Labour Code on the one side, and the legal text which settles the employer right to make deductions by way of damage from the guilty employee (but only) if the employee's debt is certain, liquid and due, and it was found as such by final and irrevocable court decision, according to art. 164 paragraph 2 of Labour Code, on other side.

Thus, in the first case, to the extent that the employer wishes to recover the compensation paid from the employee responsible for the damage, he is obliged to follow the settled rules of art. 270 and next of the Labour Code, so the court order pronounced in first instance by tribunal is final and enforceable by law and can be put in judicial enforcement.

But, though the court decision, which found that the employee's duty is certain, liquid and due, is final, however the employer is obliged that the same court order to acquire also an irrevocable character, according to art. 164 paragraph 2 of the Labour Code.

The contradiction of the laws consists in the fact that, if in the first case, the court decision is final (and enforceable, according to art. 289 of Labour Code), the employer is obliged that the same court decision to be also irrevocable in order to be put in judicial enforcement, according to art. 164 paragraph 2 of Labour Code.

Concluding, the patrimonial liability is specific to Labour Code in Romania, it has particularities regarding some subjects qualified as exception

by the law. The provisions of the labour law are completed by the provisions of general law, civil law, and in some situations, such as judicial procedure, labour law step away leaving the general law to act.

Although the actual labour code complies with international and European law, we still have difficulties in applying it in some parts, but one thing is sure: the relationships between workers and their employers are strictly submitted to it. Protection of the employees is one of the major tasks of this legislation, so all the law regarding their rights are imperative, and cannot be removed or modified such as reducing or cancelling their rights.

Notes

- (1) Modified by Law no. 480/2003, Law no. 541/2003, OUG no. 65/2005, Law no. 241/2005, Law no. 371/2005, OUG no. 55/2006, Law nr. 94/2007, Law no. 237/2007, Law no. 202/2008, OUG no. 148/2008, Law no. 331/2009.
- (2) Modified by art. I section 2 of OUG no. 65/2005
- (3) The definition is criticisable considering the recommendation MLC no. 198/2006 of International Labour Organization that recommends to its members to establish a legal presumption of the existence of a labour relation as often as there are one or more characteristic signs of such relation.
- (4) According to Government Ordinance no. 121/1998 regarding the material liability of the military, published in MOF no. 328/29.08.1998, approved by Law no. 25/1999, published in MOF No. 34/28.01.1999, the liability of the civil employees from the structure of the military and militarized institutions (Ministry of National Defence, Romanian Intelligence Service, Romanian Foreign Intelligence Service, Protection and Guard Service, Gendarmerie, Special Telecommunication Service etc.), as well as their obligation to refund are based on the material liability rules, functioning by issuing the imputation decision and committing to the payment. The rules governing the military material liability form the special law on liability for this category of employees. Similarly, according to Law no. 384/2006 on the status of soldiers and volunteers subordinate officers, published in MOF no. 868/24.10.2006 and Government Ordinance no. 121/1998, approved by Law no. 25/1999, when they prejudice the military unit in the process of preparation for battle the liability is also material (and no patrimonial) in the limit of three net monthly payments, calculated from the date of damage finding.
- (5) According to Law no. 22/1969 on employment administrators, collateral and liability in connection with asset administration for operators, authorities and public institutions, published in BOF no. 132/18.11.1969, amended by Law no. 54/1994, published in MOF no. 181/15.07.1994, corroborated with art. 270 and following of Labour Code, the administrators' liability is patrimonial, in accordance with the applicable principles of contractual civil liability, liability customized with a number of specific rules under which their liability is solidary (not conjunct) and complete, according to art. 25-25, if alongside the administrator the employee, regardless the held position, is guilty of hiring, designation

or maintaining a person in the position of administrator without the observance of age, education and training conditions as well as the rules regarding the lack of criminal history is also patrimonial liable; is also solidary liable the one guilty of not complying with the collateral by the administrator, but the liability is limited only to the value of unincorporated collateral. Art. 30 of Law no. 22/1969 regulates the cases in which the pecuniary liability of the administrator is subsidiary, when the guilty one is liable, in the limits of the amount of the remaining damage not covered by its direct perpetrator, from the moment when its insolvency was found.

- (6) In the second situation there are two exceptions: when the employee received goods which didn't deserve, which can not repay in kind and when the individual labour contract of the employee ceases before he compensate the employer, cessation followed by not closing other individual labour contract (in first case, repay the pecuniary equivalent of goods, in second, the employer can be judicially enforced to cover the employer's prejudice, according to Civil Procedure Code).
- (7) Except the presumption of administrator's guilt, in case of missing goods.
- (8) The judicial enforcement is restricted, in the case of the employees, to maximum a third of monthly salary amount without exceeding half of it, according to art. 273 of Labour Code.
- (9) Law no. 237/2007, published in MOF no. 497/25.07.2007, amended the art. 269 paragraph 1 of Labour Code.

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