European Journal of Law and Public Administration
ISSN: 2360-6754 | e-ISSN: 2559-7671
Covered in: Erih Plus; HeinOnline; CEEOL; RePEc; CrossRef; Google Scholar; KVK; WorldCat; ICI Journals Master List - Index Copernicus; EBSCO.

2024, Volume 11, Issue 1, pages: 121-130| https://doi.org/10.18662/eljpa/11.1/225

The Obligation to Inform Micro-Enterprise Employees in Writing about the Duties Listed in the Job Description - Constitutionality Approach

Răzvan VIORESCU [1]

[1] Associate professor, Phd., „Stefan cel Mare" University, Suceava, Romania, razvan.viorescu@fdsa.usv.ro

JEL Classification: H1, K3

Abstract: *The present analysis considers the aspects of the constitutionality of the regulation regarding the obligation to inform micro-enterprise employees in writing about the duties listed in the job description.*
By the Decision of June 6, 2022, issued in File No. 5,811/2/2021, the Court of Appeal of Bucharest - Administrative and Fiscal Section notified the Constitutional Court of the unconstitutionality of the provisions of the Government's Ordinance No. 37 /2021 for the amendment and completion of Law no. 53/2003 - Labor Code. In the justification of the exception of unconstitutionality, it is stated that the Government's Emergency Ordinance no. 37/2021 violates art. 41 para. (2) of the Constitution, regarding the social protection of work, because it eliminates the obligation to provide written information to employees of micro-enterprises regarding the duties listed in the job description.

Keywords: *job description; exercise of any fundamental right or freedom; social protection of work; labor law.*

How to cite: Viorescu, R. (2024). The obligation to inform micro-enterprise employees in writing about the duties listed in the job description - constitutionality approach. *European Journal of Law and Public Administration, 11*(1),121-130. https://doi.org/10.18662/eljpa/11.1/225

©2024 Published by In Manifest Network in partnership with LUMEN Publishing. This is an open access article under the CC BY-NC-ND license http://creativecommons.org/licenses/by-nc-nd/4.0/

Context

By **DECISION no. 218 of April 10, 2024 regarding the exception of unconstitutionality of the provisions of Emergency Government Ordinance no. 37/2021 for the amendment and completion of Law no. 53/2003 – Labor Code,** the Constitutional Court accepts the exception of unconstitutionality raised by the National Federation of Electricity Unions Phoenix from Calarasi in File no. 5.811/2/2021 of the Bucharest Court of Appeal - Section IX administrative and fiscal litigation and finds that the provisions of the Government Emergency Ordinance no. 37/2021 for the amendment and completion of Law no. 53/2003 - Labor Code are unconstitutional (Decision of the Constitutional Court no. 218 of April 10, 2024).

The object of the constitutionality control, as mentioned in the referral act, is the Emergency Government Ordinance no. 37/2021 for the amendment and completion of Law no. 53/2003.

The job description is the complementary document of the individual employment contract in which the nature and content of the competences, responsibilities, attributions and duties specific to the position or occupation are exhaustively specified, and the employer has the obligation to inform about this prior to the conclusion or modification of the individual contract of work. The job description is part of the individual employment contract (it is attached to it), and its content is the result of the negotiation and agreement of will between the parties, at least in relation to the initial moment of establishing the employment relationship, so unilateral modification of the description is illegal the position that leads to the essential change of the type of work.

Or, the lack of this information in written form attracts a series of consequences in terms of the right to social protection at work, the employee being unable to prove the duties established with the employer, the violation of his rights and the discretionary behavior of the employer. The employment relationship thus becomes devoid of any predictability, the employees being at the disposal of the employer, who will be able to impose excessive tasks at any time. Also, establishing the duties of the position exclusively verbally leads to the impossibility of the employees of micro-enterprises to prove the fulfillment of the duties. The legislative amendment may also harm employers who, in the event of a labor conflict, in the absence of a written document, will be unable to exercise the right to defense.

The legislative amendment may also harm employers who, in the event of a labor conflict, in the absence of a written document, will be unable to exercise the right to defense. In the sense of what is supported, the Decision of the Constitutional Court no. 408 of May 3, 2012.

Constitutional arguments

The provisions of the single article point 1 of the Government Emergency Ordinance no. 37/2021 also contravene the principle of equality and non-discrimination, enshrined in art. 16 para. (1) of the Constitution, because only employees of micro-enterprises do not benefit from the right to be notified of the job description in writing, without any objective and reasonable reason justifying their exemption from the exercise the right to be informed by a written document regarding their duties.

The new legislative solution introduced in art. 241 of the Labor Code generates, in turn, another discrimination regarding the same category of employees, since, unlike other employees, they do not benefit from the provisions of an internal regulation drawn up by the employer, being thus deprived of the general guarantees that a such administrative act with a normative character ensures them for the social protection of work.

It is also argued that the lack of harmonization of the provisions of the Government Emergency Ordinance no. 37/2021 with European Union law leads to the violation of the constitutional provisions of art. 11, 20 and 148, being indicated in this regard Council Directive no. 91/533/CEE of the Council of October 14, 1991 regarding the employer's obligation to inform workers about the conditions applicable to the contract or employment relationship, a European act with constitutional relevance through the prism of its regulatory object, circumscribed to the fundamental right to social protection of work.

The violation of art. 115 para. (4) and (6) of the Constitution, because intervention through an emergency ordinance in the area reserved for organic laws can only take place under the conditions established by the above-mentioned constitutional norms. However, the criticized normative act, which amends an organic law, negatively affects the right to social protection of work and the principle of equal rights for employees in micro-enterprises. It is also stated that both the Legislative Council and the Economic and Social Council have approved negatively the draft Government Emergency Ordinance no. 37/2021, highlighting its unconstitutionality.

The Bucharest Court of Appeal - Section IX administrative and fiscal litigation assesses that the provisions of Government Emergency

Ordinance no. 37/2021 are unconstitutional, being contrary **to art. 16 para. (1), art. 41 para. (2) and art. 115 para. (6) of the Constitution**.

The constitutional provisions invoked by the author of the exception in support of it are those of art. 11 - International law and domestic law, of art. 16 para. (1) regarding the equality of citizens before the law and public authorities, without privileges and without discrimination, of art. 20 - International treaties on human rights, of art. 41 para. (2) regarding the right of employees to social protection measures, of art. 115 para. (6) regarding the conditions under which the Government can adopt emergency ordinances and of art. 148 para. (2) regarding the priority over the contrary provisions of the internal laws of the constitutive treaties of the European Union and the other binding community regulations.

Examining the exception of unconstitutionality, the Constitutional Court observes that, although the Government Emergency Ordinance no. 37/2021 is currently no longer in force, being rejected by Law no. 275/2022, in this case is applicable the Decision of the Constitutional Court no. 766 of June 15, 2011, published in the Official Gazette of Romania, Part I, no. 549 of August 3, 2011, which allows the exercise of constitutionality control over a text of law abrogated after referral to the Court, if it continues to produce legal effects in the case in which the exception of unconstitutionality was invoked. As for these legal effects, the Court notes that, in the case, the author of the exception, the National Federation of Electricity Unions Phoenix from Călăraşi, complained that after the entry into force of the Government's Emergency Ordinance no. 37/2021, union members (employed in micro-enterprises) were harmed as a result of the conclusion of additional acts to individual employment contracts, changes capable of creating abuses on the part of employers.

Even if in this case there are no unilateral administrative acts issued under the criticized emergency ordinance, which in turn represent the legal basis of the alleged damage, the Court considers that the author of the exception has, in terms of the Administrative Litigation Law no. 554/2004, published in the Official Gazette of Romania, Part I, no. 1,154 of December 7, 2004, the capacity of an interested social body, entitled by law (Law on social dialogue no. 62/2011, currently repealed, and Law no. 367/2022 on social dialogue, in force) and by its own statute to actions in justice promoted for the defense of the rights of its members, which derive from labor legislation, collective labor contracts and individual labor contracts.

Pursuant to the provisions of art. 8 para. (11) and (12) from Law no. 554/2004, these legal entities under private law can apply to the court for the annulment of the administrative act, invoking the violation of a

legitimate public interest only in the alternative, to the extent that the harm to the legitimate public interest logically follows from the violation of the subjective right or the legitimate private interest. In the particular case of government ordinances, art. 9 para. (5) of the same law allows the formulation of the action in administrative litigation, which may have as its object the granting of compensations for damages caused by Government ordinances, as is the case in this case. The court entrusted with the settlement of the dispute is the one competent to concretely assess the fulfillment of all the conditions stated above, the Constitutional Court limiting itself, in the exercise of the posterior control of constitutionality, to considering that in the case the condition of the applicability of Decision no. 766 of June 15, 2011, cited above, in terms of the production of legal effects after the repeal of the criticized text/normative act.

3. Regarding the substance of the exception of unconstitutionality, the Court finds that it is well-founded for the reasons that will be shown below.

In its jurisprudence, the Court has consistently held that an essential component of the right to work is the social protection of work, which includes, in turn, the aspects provided for in art. 41 para. (2) from the Constitution (Decision no. 312 of July 8, 2004, published in the Official Gazette of Romania, Part I, no. 797 of August 30, 2004), this having its origin in the provisions of art. 1 paragraph (3) from the Constitution (Decision no. 252 of September 18, 2001, published in the Official Gazette of Romania, Part I, no. 736 of November 19, 2001), which enshrines the principle of the welfare state (regarding this constitutional concept, see Decision No. 1,594 of December 14, 2011, published in the Official Gazette of Romania, Part I, No. 909 from December 21, 2011). The social protection of work is a bivalent notion, being regulated both as a fundamental right from the perspective of the citizen (Decision no. 269 of May 12, 2005), and as obligation from the perspective of the state in order to protect the person in a position of economic inferiority within the employment relationship (Decision no. 356 of July 5, 2005).

With regard to the guarantees of the fundamental rights to work and to the social protection of work, the Court established that they aim at the legal regulation of labor relations, ensuring their stability, the rights and obligations of employers and employees, they have the purpose, on the one hand, to ensure the development of legal labor relations in a legal, judicious and fair framework, the defense of both the legitimate interests of both employers and employees (Decision no. 506 of October 4, 2005), and, on

the other hand, to prevent employers from ordering, on their own initiative, the termination of employment relationships in an abusive manner, illegal and unjustified and, correlatively, to ensure the exercise of the employees' right to defense against any illegal or unfounded measures (Decision no. 205 of June 26, 2001).

Therefore, the Court established, from the full and corroborated interpretation of the rules contained in art. 41 para. (2) of the Constitution, the fact that the enumeration of the component elements of the right to work and to social protection of work is not exhaustive, they configure a minimum and mandatory standard of protection of the right, the ordinary legislator having the possibility of adapting the content of the right to other specific situations.

In the distinction between the defining components of the right to work and to social protection of constitutional origin, on the one hand, and those that have a purely legal nature, on the other hand, the Court found that informing and consulting employees have as a premise the existence of employment relationships, placed, in turn, in the sphere of protection of the right to work, a right enshrined in art. 41 para. (1) from the Constitution; consequently, the legislator's obligation to establish concrete measures for informing and consulting employees covers, from a temporal point of view, the period between the start and termination of the employment relationship, so that throughout this interval the employer must be active in fulfilling - their faith. It follows that neither informing nor consulting employees can be qualified as measures that protect the party in an economically inferior position in social labor relations and, especially, in its relations with the employer. Therefore, the Court found that the information and consultation of employees represent genuine social protection measures at work.

Moreover, analyzing the international regulations in the matter of social labor protection, the Court ruled that, in addition to the essential components of the right to social labor protection expressly mentioned in the content of the second thesis of art. 41 para. (2) of the Constitution, the normative content of this framework right is also defined by the possibility of the constitutionalization through the jurisprudence of the Constitutional Court of the social protection measures of labor regulated by international treaties, as well as those provided by law as a result of assumed international obligations by the Romanian state or the need to regulate some measures with a particular social-economic impact (see, in detail, Decision no. 64 of February 24, 2015, paragraphs 20-29).

Conclusions

The Court notes that in this case the exemption of the employees of a micro-enterprise, established by art. single point 1 of the Government Emergency Ordinance no. 37/2021, from the general rule according to which employees have the right to obtain the job description in written form. The Court observes that this is a right of the employee, correlative to the obligation regulated by art. 17 para. (1)-(4) of the Labor Code, according to which the employer has the obligation to inform the person selected for employment/employee about the essential clauses that he intends to include in the contract or to modify them. The information must take place prior to the conclusion or modification of the individual employment contract and is considered fulfilled by the employer at the time of signing the individual employment contract or the additional act, as the case may be. Among the essential clauses about which the employee or future employee must be informed is the function/occupation according to the specification of the Classification of Occupations in Romania or other normative acts, as well as the job description, with the mention of the job duties. Most of the elements in this information, including the one regarding the job description, must also be found in the content of the individual employment contract.

According to art. 15(ind.1) lit. a) and art. 16 para. (1) of the Labor Code, the acceptance of a person to work without the conclusion of the individual employment contract in written form, at the latest on the day before the start of the activity, is undeclared work, and the obligation to conclude the individual employment contract in written form rests with the employer. At the same time, art. 16 para. (3) of the same code stipulates that the employer is obliged, before the start of the activity, to hand the employee a copy of the individual employment contract.

From the examination of the previously mentioned texts of the Labor Code, the Court notes that they materialize some concrete legal measures by which the employee's right to information is guaranteed, as a component of the employees' fundamental rights to the social protection of work, in accordance with the imperative norms of Art. 41 para. (2) from the Constitution.

Prior information of the future employee regarding the essential elements of the individual employment contract or of the employee about the new duties as a result of the change in the type of work and the communication of this information in written form, within the employment contract or an additional/complementary act, are measures essential protection of the person in a position of economic inferiority within the

employment relationship. The position occupied by the employee and the specific duties of this position, written in the job description, are the key elements of the employment contract, inextricably linked and which materialize the very object of the work/service provided by the employee in the relationship with the employer. The Constitutional Court ruled in its jurisprudence that one of the principles underlying the right to work is the stability of the legal relationships that arise with the conclusion of the individual employment contract, this principle stemming from the state's obligation to create the legislative framework intended to ensure employees' safety and job retention guarantee (Decision no. 1,039 of July 9, 2009).

Therefore, the exclusion of an employee from these fundamental rights related to the social protection of work is equivalent to the violation of art. 41 para. (2) from the Constitution.

The absence of the job description from the contents or as an annex of the employment contract - act which, according to art. 16 para. (1) and art. 161 para. (2) of the Labor Code, it must be concluded in written form and kept, in a copy, at the workplace, on paper or on electronic support - it seriously endangers the rights of the employee and puts under the sign of unpredictability the entire development of the report of work, potentially giving rise to arbitrary or even abusive behavior by the employer. At the same time, the lack of this document in written form may affect the course of the procedures provided for by law in the case of a labor dispute, considering the employer's obligation to make available to the court or to the plaintiffs the documents requested from him as the issuer.

The principle of equality and non-discrimination, established by art. 16 para. (1) of the Constitution, guarantees the application of equal legal treatment to situations that are objectively identical or similar, the differences in legal regime being allowed only to the extent that they are justified through the prism of conditions that, rationally, are obviously different.

With regard to the right to consultation of employees, the Court held in its jurisprudence on the matter that this also represents a genuine measure of social protection of labor (Decision no. 64 of February 24, 2015, cited above). The employee's right to participate, in one form or another, in the development of the internal regulation applicable in the employing unit is part of the scope of rights which, by their nature, guarantee the active obligation of the state to ensure the social protection of work that the employee enjoys in virtue of art. 41 para. (2) from the Constitution. Given that the internal regulation contains determining elements for the development of the employment relationship (such as the rights and

obligations of the employer and the employees, promotion conditions, violations and disciplinary sanctions, the disciplinary procedure or the criteria and the professional evaluation procedure), the consultation of the employees when drawing up of this administrative act with normative character and with binding legal force towards the parties of the employment contract represents the expression of good faith of the employer, therefore of the contractual party with position dominant, being able to contribute to ensuring the security and stability in the work of the employees.

At the same time, for the arguments shown above, the Court considers that the criticized normative act also contravenes the provisions of art. 11, of art. 20 and of art. 148 para. (2) of the Constitution, in relation to the conventional norms and European law that guarantee the right to information and consultation of employees, respectively part I pt. 21 and 29 of the revised European Social Charter, adopted in Strasbourg on May 3, 1996 and ratified by Law no. 74/1999, published in the Official Gazette of Romania, Part I, no. 193 of May 4, 1999 (according to which "workers have the right to be informed and consulted within the enterprise", respectively "all workers have the right to be informed and consulted in collective dismissal procedures"), Directive 91/533/EEC of Council of October 4, 1999 regarding the employer's obligation to inform workers about the conditions applicable to the contract or employment relationship [art. 1 paragraph (2), which allows states to establish exceptions to the application of the directive under strict conditions, namely: a) for a total duration that does not exceed one month and for a working week that does not exceed 8 hours or b) of an occasional nature or especially, provided that, in these cases, the non-application of the directive is justified by objective reasons] and art. 27 - The right of workers to information and consultation within the enterprise from the Charter of Fundamental Rights of the European Union (according to which "Workers or their representatives are guaranteed, at the appropriate levels, timely information and consultation, in the cases and under the conditions provided by law of the Union and the national legislations and practices") (on the use of a norm of European law within the framework of constitutionality control as a norm interposed to the reference one (see in detail Decision no. 668 of 18 May 2011)

References

Decision of the Constitutional Court no. 218 of April 10, 2024 regarding the exception of unconstitutionality of the provisions of Emergency Government Ordinance no. 37/2021 for the amendment and completion of Law no. 53/2003 – Labor Code, *Official Gazette of Romania*, Part I, no. 523 of 05.06.2024

Decision of the Constitutional Court no. 408 of May 3, 2012. *Official Gazette of Romania*

Decision of the Constitutional Court no. 766 of June 15, 2011. *Official Gazette of Romania, Part I, no. 549 of August 3, 2011*

Decision of the Constitutional Court no. 269 of May 12, 2005. *Official Gazette of Romania*, *Part I, no. 525 of June 21, 2005*

Decision of the Constitutional Court no. 205 of June 26, 2001. *Official Gazette of Romania, Part I, no. 588 of September 19, 2001*

Decision no. 205 of June 26, 2001. *Official Gazette of Romania, Part I, no. 588 of September 19, 2001*

Decision of the Constitutional Court no. 64 of February 24, 2015. *Official Gazette of of Romania, Part I, no. 286 of April 28, 2015*

Decision of the Constitutional Court no. 1,039 of July 9, 2009. *Official Gazette of Romania, Part I, no. 582 of August 21, 2009*

Decision of the Constitutional Court no. 668 of 18 May 2011, published in the Official Gazette of Romania, No. 487 of 8 July 2010, *Official Gazette of Romania*

Decision no. 356 of July 5, 2005. *Official Gazette of Romania, Part I, no. 825 of September 13, 2005*

Decision no. 506 of October 4, 2005. *Official Gazette of Romania, Part I, no. 982 of November 4, 2005*