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Prohibition Of Pregnant Employee's Dismissal During the Early Pregnacy until the End of the Maternity Leave

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PROHIBITION OF PREGNANT EMPLOYEE'S DISMISSAL DURING THE EARLY PREGNACY UNTIL THE END OF THE MATERNITY LEAVE

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Abstract

These considerations herein propose to bring in legal debate the potential possibility of an employer to dismiss a pregnant employee, in another situation than that of a reorganization or bankruptcy, even when the employee informed her employer of her pregnancy condition.

We shall address this situation considering several hypotheses that the employer may find himself, such as: relocation to a different city, closure of a work site, and suspension of the activity recorded in the Trade Register for a period of no more than three years or cancellation of an entire department. In conclusion, we support that it cannot be accepted, without exception, the argument that a pregnant employee can be fired for reasons unrelated to her state, than in case of a reorganization or bankruptcy, showing that there are situations where the conventional reorganization results in the

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proper cancellation of the job held by the pregnant employee, but also of other existing jobs in the organizational chart of the company.

The legislation provisions in this field are criticized with arguments, appreciating that exceptions should not be limited to judicial reorganization or bankruptcy.

Keywords:

employer, working pregnant, worker who has recently given birth, breastfeeding workers, maternity protection, reorganization, bankruptcy, European directive.

The notion of pregnant employee, the employee who has recently given birth and the breastfeeding employee

In the domestic legislation, the notion of a pregnant employee can be found both in Law no. 53/2003 republished - in the Labour Code, as well as in the Ordinance 96/2003 regarding maternity protection at work.

Thus, Ordinance 96/2003 on maternity protection at work transposes the provisions of the Directive 92/85/EEC and defines the following:

- **The pregnant employee** is the woman who gives written notice to the employer of her physiological pregnancy condition and attaches a medical document issued by the GP or specialist to attest this state;
- **The employee who has given birth** is the woman who resumed work after confinement leave and asks in writing the employer for the safe measures provided by law, attaching a medical document released by the GP, but not later than 6 months from the date of birth;
- **The employee who is breastfeeding** is the woman who, when resuming work after the confinement leave, breastfeeds her child and gives a written notice to the employer regarding the beginning and end of the breastfeeding period, attaching medical documents issued by the GP in this respect.

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Dismissal – Employer unilateral act

Dismissal is the termination of the individual employment contract at the employer's choice. According to art. 58 paragraph (2) of the Labour Code, dismissal may be required for[2]:

a. Reasons relating to the employee according to art. 61 letters. (a-d) Labor Code;

b. Reasons not related to the employee according to art. 65 Labor Code.

We will analyze in the following the dismissal under article. 65 of the Labor Code, for reasons not related to the employee, taking into account the prohibition laid down in Article 60 of the same code *"Dismissal for reasons not related to employees as persons, represents the termination of the individual labor contract determined by the cancellation of the working place held by the employee, for one or more reasons not related to its person. These reasons concern, in fact, the employer. He is the one who from various reasons proceeds to the cancellation of one or more jobs with the consequent dismissal of those employees."* (A. Țiclea, (2013):8, B)"

According to art. 66 of the Labor Code, dismissal for reasons not related to the employee may be individual or collective.

The employer has certain prerogatives in terms of organization and operation of the unit.[3] Exercising this organizational *prerogative "the employer is only one able to determine the structure of the unit - its organization - the number and name of departments, collaborative relationships or subordination between them (the rules of organization and operation), the rules of work (the by law), etc..."* (A. Țiclea, (2013):9, B*)*

Given those under discussion, dismissal for cancelling the job, the employer's unilateral act is subject to the principle of legality. Consequently, the employer may require the dismissal for the cancellation of job only in accordance with the procedure provided by law. Thus, the Labour Code regulates individual (art. 21 din OUG No. 96/2003) and collective (art. 68-74 of the Labour Code) dismissal procedure, the prohibitions on dismissal (art. 60 of the Labour Code) control and sanctioning of unlawful dismissals (art. 78-80 of the Labour Code) and

[2] contract at the employer's choice. According to art. 58 paragraph (2) of the Labour Code, dismissal may be required

[3] The employer has certain prerogatives in terms of organization and operation of the unit

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work conflict resolution (art. 266-275 of the Labour Code and art. 208-216 of the Social Dialogue Law No. 62/2011).

Prohibition of pregnant employee's dismissal

In accordance with art. 60 letter (c) of the Labour Code, the employer cannot order dismissal during the employee' s pregnancy, to the extent that the employer is aware of this fact, prior to issuing the dismissal decision. This provision does not apply for reasons that occur as a result of a judicial reorganization, dissolution or bankruptcy of the employer under the law. Moreover, even Government Emergency Ordinance 96/2003 on maternity protection at work[4] in art. 21 maintains the prohibition of the dismissal not only of the pregnant woman, but also of the employees who have recently given birth and those breastfeeding..

This prohibition, as well as the provision of the Labor Code, does not apply for reasons that occur as a result of a judicial reorganization, dissolution or bankruptcy of the employer under the law.

Directive 92/85/EEC - on promoting applicable measures of improving health and safety at work in pregnant workers' case, those who have recently given birth or are breastfeeding, in order to guarantee the workers exercising their rights to protection of health and safety at work provides in art. 10 the following[5]:

- Member States shall take the necessary measures to prohibit the dismissal of pregnant workers, workers who have recently given birth or are breastfeeding, in the period from early pregnancy until the end of the maternity leave, with the exception of some special cases not connected to their condition, permitted by law and/or national practice and, if appropriate, in which the competent authority has given its consent;
- When a pregnant worker who has recently given birth or is breastfeeding is dismissed during the period mentioned above, the employer must provide in writing good reasons for dismissal;
- Member States shall take the necessary measures to protect pregnant workers, workers who have recently given birth or are breastfeeding in consequences of illegal dismissal.

[4]See art. 21 din OUG No. 96/2003.
[5]See art. 10 of Directive 92/85/CEE.

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Therefore art. 10 paragraph (1) of Council Directive 92/85/EEC provides that the application of individual dismissal in a pregnant employee situation, the reasons underlying this measure are not related to their condition and be admitted by law and/ or national practice.

Thus, the cancellation of the job can be justified and the employee can be fired if: the employer, by virtue of privilege regarding the organization and operation of the unit, makes significant changes in organization, in structure or technology, resulting in cancellation of an establishment, work site, department or service.

Also, art. 60, letter (c) of the Labor Code in conjunction with art. 21, paragraph (1), letter (a) of OUG 96/2003 implies that the pregnant employee can be fired not only in the case of a judicial reorganization or bankruptcy (as provided in art. 60 paragraph (2)), but also in the case of the employee's dismissal under art. 65 (the effective cancellation of a job for a real and serious cause, without any connection to pregnancy).

Art. 21 paragraph 3 of Government Emergency Ordinance 96/2003 has this content as a result of the change occurred in section 7 of Law no. 25/2004. Prior to the amendment, Government Emergency Ordinance 96/2003 had the following content*: "The provisions of para. (1) do not apply to dismissals for economic reasons arising from the cancellation of the job held by the employee as a result of economic difficulties, technological change or reorganization of the employer under the law."*

The judicial reorganization[6] is the procedure applied to the debtor, legal entity, in order to pay its debts, according to the scheduled payment of claims. The reorganization involves the preparation, approval, implementation and compliance with a plan, called a reorganization plan, which may provide, altogether or separately:

- the debtor's financial and operational restructuring;
- corporate restructuring by changing the social capital structure;
- restricting the activity by liquidation of the assets of the debtor;

By bankruptcy[7], we understand the collective and equal insolvency proceedings applied to the debtor for the assets' liquidation to cover its liabilities, followed by the removal of the debtor from the registry where it is registered;

[6]See art. 3, paragraph 20 of Law 85/ 2006 regarding insolvency proceedings, published in Official Gazette of Romania, Part I, no. 359 of April 21, 2006.
7See art. 3, paragraph 23 of Law 85/2006 regarding insolvency proceedings.

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So, the lagislator's solution seems excessive as long as it regulates only the possibility of a judicial reorganization, but this still does not remove the possibility of a **conventional reorganization**.

The employer may decide the conventional reorganization in case of discovering new markets and targets a profit growth moving the activity in a different place other than the one that has employees or facing economic, financial or technological difficulties, a situation which is not covered by law insolvency proceeding, therefore it is not in judicial reorganization and neither in banktruptcy, but aimes improving the activity and the economi-financial recovery.

This method of conventional reorganization is intended for:

- payment of debts to creditors in the event of an economic difficulty which entails in practice negotiations by the debtor (employer) with the major creditors, in order to reschedule the payment of receivables. As a result of these negotiations, the employer may be in a position to change the organizational chart of the unit.
- reducing costs and or financial loss as a result of lower income.
- the impossibility of carrying out the activity as a result of the impossibility to use some equipment or technology (withdrawal of required permits (e.g: environmental permit, sanitary-veterinary etc)).
- relocation of business and society activity in a different place to bring profit.

These situations may materialize by closing a work site or cancelling one department or suspending the activity recorded in the Trade Register for a period of more than three years[8].

Therefore, we consider that the ***conventional reorganization*** is not contrary to the provisions of Directive 92/85/EEC, but is allowed by national practice, as provided in art. 10 paragraph (1) of the Directive. We must notice that in practice there are situations mentioned above, and if conventional reorganization weren't to be accepted as an exception from the prohibition of the dismissal of female employees, who are pregnant, those who have recently given birth or are breastfeeding, we would find ourselves in anomalous situations in which the employer,

[8]See art. 237 paragraph (2) of Law 31/1990 on trading companies, republished in the Official Gazette of Romania, Part I, no. 1066 of November 17, 2004.

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although he moved an activity to another place or closed the work site is bound to maintain in force the individual labor contract with the protected employee, even if it has no place to work.

To prevent potential abuses, the conventional reorganization shall have as an effect not only the effective cancellation of the job held by the pregnant employee, but also other jobs existing in the organizational chart of the company .Therefore, relocation of the headquarters to a different city,closing a work site, suspension of the activity recorded in the Trade Register for a period of no more than three years or cancellation of an entire department, may constitute grounds for dismissal that is unrelated to pregnancy, is effective and has a real and serious cause. Obviously, in this situation, the employer is bound to give substantiated reasons in writing for the dismissal decision.

Prohibition to dismiss an employee during risk assessment maternity leave, maternity leave or parental leave

In fact, even the Government Emergency Ordinance no. 96/2003 regarding maternity protection at work, published in the Official Gazette of Romania, Part I, no. 750 of 27.10.2003, subsequently amended and supplemented, in art. 21 appoints the prohibition of dismissing not only a pregnant employee, but also an employee who has recently given birth and a breastfeeding employee. The Government Emergency Ordinance no. 96/2003 regarding maternity protection at work, also extends the prohibition for female employees during risk assessment maternity leave, maternity leave, parental leave for children aged up to 2 years or respectively 3 years for a disabled child and sick child care for children aged up to 7 years, respectively 18 in the case of a disabled child. Moreover, the ordinance extends the prohibition of dismissal for a period of maximum 6 months from the date the female employee is returning from parental leave, namely childcare leave[9]. An identical provision is found in Government Emergency Ordinance no. 111/2010 concerning the leave and monthly childcare allowance, to which is also added the prohibition of dismissal a female employee who is being paid an incentive scheme if she resumed her activity before her child reached the age of 1 year[10].

[9] See art. 21 of Government Emergency Ordinance no. 96/2003.
[10] See art. 7 and art. 25 of Government Emergency Ordinance no. 111/2010.

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This prohibition, as well as the provision of the Labour Code, does not apply for reasons that occur as a result of judicial reorganization, bankruptcy or dissolution of the employer under the law. Or, as related in the previous considerations, if it is not accepted the thesis according to which the conventional reorganization is the exception to the rule alongside the judicial reorganization, bankruptcy or dissolution, we would be in the situation where the employer is forced to reinstate the protected female employee when returning from childcare leave, even though he dissolved the entire department she was part of or relocated the activity to another city. In another hypothesis if, in the unit, there is a female employee who is being paid an incentive scheme, the employer could not dispose the conventional reorganization that would result in the job cancellation of the protected employee.

Conclusions

The dismissal for reasons not related to the female employee's person raises, in practice, a number of applicability and interpretation problems. The most sensitive situation is, obviously, the dismissal of the female employees who are pregnant, have recently given birth or are breastfeeding. It is therefore necessary to clarify the procedure of protected persons dismissal and completion of relating statutory provisions. Thus, in our opinion, it is absolutely necessary that by exception, the employer could dispose the dismissal of the pregnant employee, employee who has recently given birth and the employee who is breastfeeding, as well as the employee during risk assessment maternity leave, maternity leave, parental leave for children aged up to 2 years or respectively 3 years for a disabled child and sick child care for children aged up to 7 years, respectively 18, in the case of a disabled child and for a period of maximum 6 months from the date the female employee is returning from parental leave, namely childcare leave, as a result of the conventional reorganization, judicial reorganization or bankruptcy under the law.

De lege ferenda

- Art..60 parag. (2) of the Labour Code art. 21 parag. 3 of O.U.G. no. 96/2003 and art. 25 parag. (4) of Ordinance no. 111/2010 must be amended as follows:
- Art. 60. parag. (2) of the Labor Code will have the following form: "*The provisions of para. (1) shall not apply in the case of dismissal due*

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to conventional reorganization, if relocation of headquarters or placing a work site in another city was decided, closing a work site, suspension of the activity recorded in the Trade Register for a period of 3 years or cancellation of an entire department / division / service, judicial reorganization or bankruptcy under the law."

- Art. 21 parag. (3) of no. O.U.G. 96/2003 will have the following form: *"The provisions of para.. (1) shall not apply in the case of dismissal, due to conventional reorganization as it was decided by relocation of headquarters or placing or placing a work site in another city, closing a work point, suspension of the activity recorded in the Trade Register for a period not exceeding three years or cancellation of an entire department/ division /service, reorganization or bankruptcy under the law ."*
- Art. 25 parag. (4) of no. OG 111/2010 „*Provisions of para. (2) and (3) shall not apply in the case of dismissal due to conventional reorganization, if only it was decided by the relocation of the headquarters or work site in another city, closing a work site, suspension of the activity recorded in the Trade Register for a period not exceeding three years or cancellation of an entire department/ division/ service, judicial reorganization or bankruptcy under the law.*"

We believe that such a change of the legal provisions would bring a normal condition regarding the employer's possibility to establish its organization and operation of the unit.

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