Employment

Collective Dismissals

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Contents

This booklet is intended to give the employers a preliminary account of the legal framework governing the collective dismissals procedures. It includes a concise presentation of the steps to be followed when collective dismissals are carried out, as well as several case studies addressing some of the most common issues that are met in practice.

Consequently, the information and opinions herein should not be treated as a comprehensive study and should not be construed or used as substitute for specific legal advice concerning particular restructuring projects involving collective dismissals. We recommend that our team is consulted before starting any such projects.

The booklet speaks as of its date and does not reflect any changes in Romanian law or practice after such date.

For details and clarifications on any of the topics dealt with in this booklet please contact the following attorneys:

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Introduction

Here we are facing the first global financial crisis since we became a market economy. Our fellow member states from Western Europe had to deal with recession as recent as the late 1980s and early 1990s, whereas Romania was just awakening to a new type of economy and was plunging into transition. While we know how to deal with a less than perfect economy, we are inexperienced in consequences of a possible recession.

Crisis always hit employment, making room for unemployment. Week after week, we find out about corporations and industries cutting significant numbers of jobs or, even worse, wiping them out altogether, as they go into collapse.

In Romania so many companies have announced so far either collective dismissals or sending people home due to the so-called "technical unemployment[1]". Whereas the latter does not raise particular legal problems, collective dismissals may prove complicated and thorny. The breach of one provision stating the legal steps to be followed along the procedure may result in the whole process being reversed.

Sounds harsh? It is nonetheless true. The Romanian law provides explicitly that the violation of any norm regulating the dismissal of employees allows the court of law to cancel the dismissal decisions and to reinstate the employees in their former jobs.

Țuca Zbârcea & Asociații has a reputable employment department, which advises some of the biggest employers in the country[2]. In our practice, we came across most aspects of labour law, from complex litigation to negotiations with unions and, of course, collective dismissals.

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1 A legal scheme under the Romanian Labour Code whereby the employer may pay the employees 75% of the salary, while keeping them at home due to temporary lack of work.
2 For an overview of our skills and experience in employment law, please visit www.tuca.ro/ Practices/ Employment.

In this booklet we wish to address the issue of collective dismissals at a particular time when employers may have to implement it efficiently and in a cost-effective manner. As the matter is regulated by both the Labour Code and collective bargaining agreements (CBAs), as well as by special regulations for specific circumstances, this booklet provides for a concise presentation of the steps involved.

Not only was our intention to make available to our clients a structured approach to the legal concept of collective dismissals, we also intended to share our experience. We did so by including a series of case studies, showing the most frequent mistakes employers make and how to avoid them.

Our experience also taught us that each and every process of dismissal has its particularities. We therefore recommend that employers seek specific legal advice before implementing any such procedure.

Țuca Zbârcea & Asociații's expertise in labour law is second to none and our resourceful legal team is here to help.

Applicable Regulations

The collective dismissal procedure is mainly regulated in the Labour Code. The National Collective Bargaining Agreement (CBA) also contains provisions applicable to collective dismissals.

Besides the above acts, the employers also have to take into account the provisions of the CBAs concluded at the industry branch level and the provisions of those concluded at the company's level.

In implementing the dismissal procedure, the employers have to keep in mind that a CBA concluded at a lower level (e.g. a CBA at the company's level) cannot provide for rights below the limits set forth by agreements concluded at higher levels (e.g. a CBA concluded at the branch level or at the national level).

In the event of any inconsistency between the different applicable CBAs, the provisions establishing more favourable rights for the employees shall prevail.

There are also special enactments[3] that provide for specific dismissal procedures in particular circumstances, which may derogate from the general legal framework indicated above. In this material we chose to present only the common procedure, as it is of broad interest.

3 Government Emergency Ordinance 8/2003 regarding the stimulation of the restructuring, reorganization and privatization processes of national companies and companies having the State as majority shareholder; Government Emergency Ordinance 98/1999 on social protection of the persons whose individual employment agreements are terminated as a result of collective redundancies, etc.

Collective Dismissals

Legal Background

The legal provisions regulating the collective dismissals will become applicable to the dismissals carried out by employers within a period of 30 days, for one or more reasons not pertaining to the concerned employees, where the number of redundancies is:

- at least 10 employees, if the employer performing the dismissals has more than 20 and less than 100 employees;
- at least 10% of the employees, if the employer performing the dismissals has at least 100, but less than 300 employees;
- at least 30 employees, if the employer performing the dismissals has at least 300 employees.

Procedural Stages

Stage 1

If the employers are contemplating collective dismissals, they have to initiate consultations with the trade unions or, as the case may be, with the employees' representatives. The consultations agenda will cover at least (i) the methods and modalities for avoiding the collective dismissals or for reduction of the number of employees to be dismissed, and (ii) the appropriate means for mitigating the consequences of the collective dismissals by resorting to social measures aimed at, inter alia, providing support for re-qualification and professional re-conversion of the dismissed personnel.

As the Labour Code requests the employers to offer the employees the possibility of making constructive proposals, the employers will have to notify in writing the trade unions or, as the case may be, the employees' representatives, on all relevant information regarding the procedure.

The information provided to the trade unions/employees' representatives shall include at least the following:

- the number and categories of employees normally employed;
- the reasons for the planned redundancies;
- the number of categories of employees to be made redundant;
- the period over which the planned redundancies are to be effected;
- the criteria contemplated with a view to establishing the priority sequence upon dismissal, according to labour law and the applicable collective labour agreements;
- the contemplated measures for limiting the number of dismissals;
- the measures meant to mitigate the consequences of the dismissals and the severance payments to be granted to the dismissed employees, according to labour law and the applicable collective labour agreements;
- the term within which the trade unions/employees' representatives may submit proposals for avoiding dismissals/reduction of the number of dismissed employees.

A copy of the notice sent to the trade unions/employees' representatives shall also be submitted with the Territorial Labour Inspectorate, as well as with the Territorial Employment Agency.

Mention should be made that, pursuant to the provisions of the National CBA, the consultations with the trade unions/employees' representatives will be initiated (i) 15 days before the issuance date of the notice regulated under Article 71[1] of the Labour Code, in the case of employers having less than 100 employees, (ii) 20 days before the issuance date of the notice regulated under Article 71[1] of the Labour Code, in the case of employers having between 101 and 250 employees, and (iii) 30 days before the issuance date of the notice regulated under Article 71[1] of the Labour Code, in the case of the employers having more than 351 employees.

Stage 2
The trade unions or, as the case may be, the employees' representatives will have a 10 day term as of the receipt date of the notice sent by the employers, to analyze the received information and the technical and economic substantiation of the dismissals and to produce any proposals they deem appropriate in order to avoid the collective dismissals or to reduce the number of dismissed employees. The employers have the obligation to reply in writing, by providing arguments to any proposals received, no later than 5 days.

Stage 3
After finalizing the consultations with the trade unions or, as the case may be, with the employees' representatives, if the employers decide to proceed with collective dismissals, they will issue a second notice. The second notice shall reiterate all the elements included in the first one, as well as the outcome of the consultations with the trade unions or, as the case may be, with the employees' representatives. This second notice shall be submitted with the Territorial Labour Inspectorate, the Territorial Employment Agency and it shall also be sent to the trade unions/ the employees' representatives, at least 30 days prior to the issuance date of the individual dismissal decisions.

Stage 4
The employers will issue individual dismissal decisions for each of the employees. Each decision will include the mandatory items provided by the Labour Code: (i) reasons for the dismissal; (ii) duration of the prior notice term; (iii) criteria for the establishment of the dismissal sequence; (iv) the list of all vacant positions in the unit, if applicable, and the term within which the employees have to express their intention to occupy a vacant position (if there are no vacant positions, a specification in this sense shall be made). The dismissal decisions shall produce effects as of the date of their communication, which may be the date when the decisions are communicated by registered mail with acknowledgment of receipt, the date when the employees signed for having been officially informed thereof, the date when the decisions are communicated by means of a bailiff, etc.

Stage 5
The employees to be dismissed shall benefit from a 20 business day prior notice term. Upon the expiry of the prior notice term, the employment relationships between the employers and the employees who were subject to the collective dismissal procedure shall cease.

Specific Issues

Dismissal sequence
The National CBA requires that a certain sequence should be observed upon the termination of individual employment agreements further to the elimination of positions. The sequence bellow will be applicable to the employers upon implementation of the collective dismissal procedure:

- the individual employment agreements of the employees that cumulate two or several positions, as well as of the employees that cumulate pension with salary;
- the individual employment agreements of the employees that meet the age limit retirement conditions (retirement for age limit) and did not apply for pension;
- the individual employment agreements of the employees that meet the conditions for retirement upon request (early retirement).

Minimal criteria
The National CBA provides for certain minimal criteria that should be taken into account when terminating individual employment agreements, criteria that shall be complied with during the collective dismissal procedure, respectively:

- if the measure affects two spouses working in the same unit, the individual employment agreement of the spouse with the lowest income shall be terminated, without being possible to terminate thereby the individual employment agreement of an employee occupying a position which was not envisaged by the redundancy;
- the measure shall first affect the employees that do not have children in care;
- the measure shall affect, last of all, the women having children in care, the widowers or divorced men having children in care, the sole family providers and the employees, men or women, having maximum 3 years up to retirement upon their request.

According to the National CBA, if two or several employees find themselves in the same circumstances, the employer must decide on who shall be dismissed pursuant to consultations with the unions.

Prohibitions
The Labour Code and the National CBA prohibits the employers that proceeded with collective dismissals to employ new staff in the positions formerly occupied by the dismissed employees for a period of 9 months as from the date the collective dismissals took place. If the dismissed employees refuse to re-occupy the vacant positions, the employers will be entitled to hire new personnel for the respective positions.

Case Studies

Prior Notice

The National CBA stipulates in Article 80 (2) that, in case of dismissals, the employer is under the obligation to inform the employees in writing about the prior notice term.

The above mentioned provision of the National CBA created confusion among the employers with respect to whether the prior notice term should be communicated to the employees as a different document or should be part of the dismissal decision and communicated to the employees together therewith.

In our practice, we came across situations where employers informed the employees about the prior notice term in writing before issuing the dismissal decisions.

We consider that such ways are not in line with the provisions of the Labour Code and that they put the employers at the risk of seeing the entire dismissal procedure annulled by the courts.

According to Article 74 of the Labour Code, the dismissal decision shall indicate, among other mandatory elements, the duration of the prior notice term. Pursuant to the Labour Code, once communicated to the employee, the dismissal decision becomes effective.

In other words, the prior notice term is one of the elements that are communicated to the employees together with the dismissal decision.

The prior notice term runs from the date the dismissal decision is communicated to the employee. Once the prior notice term expired, the employment relationships between the employer and the employee cease to exist, without any other formalities.

Available Jobs

The National CBA provides that, before notifying the employees about the prior notice term, the employer is under the obligation to inform the employees whether they are offered or not another vacant position existing within the company. Pursuant to the National CBA, if the employee refuses the position offered or if no position is offered, the employer may proceed with the dismissal procedure.

There is no express provision in the Labour Code to the effect that the employer must offer vacancies in the company to the dismissed employees, if they are dismissed pursuant to a cut down of jobs (for reasons not related to their persons, as stipulated in the Labour Code).

The Labour Code stipulates that such a measure should be taken when employees are dismissed for poor professional performance. According to Article 74, the dismissal decision issued for poor professional performance should include, among other mandatory elements, the list of all existing vacancies within the company. According to Article 67 of the Labour Code, the employees dismissed for reasons not related to their persons shall benefit from active measures for unemployment control.

Even if there is no express provision in the Labour Code regarding the obligation of the employer to offer vacancies, if available, to the employees whose positions have been suppressed, we find it recommendable that the employers do so.

The main reason is that, if the employees dismissed for reasons related to their persons (i.e. poor professional performance) are offered the possibility to opt for a vacant position that matches their skills, than there are even more grounds for offering the same opportunity to the employees dismissed for reasons not related to their persons (i.e. collective dismissals). The employee who is to be dismissed for reasons not related to his/her person should be given the opportunity to avoid unemployment by opting for another available job with the same employer.

Communication of the Dismissal Decision

According to the provisions of the Labour Code, the dismissal decision is considered communicated either at the date the employee signed for receipt or at the date the decision is communicated by registered mail with acknowledgment of receipt.

As a matter of practice, we came across lots of cases in which the employees refused to sign the dismissal decision for receipt or the mail form standing for the acknowledgment of receipt. Given that, according to the provisions of the Labour Code, the dismissal decision becomes effective as of the date of its communication to the employees, the employers may face difficulties in proving that the dismissal became effective.

In order to avoid such difficulties, we recommend that the dismissal decisions should be communicated to the employees through a bailiff. The bailiff may post the decision at the employee's domicile if nobody signs for receipt and the courts of law accept this as a valid communication procedure.

Prohibitions to Dismiss

There are certain circumstances expressly provided by the Labour Code under which the employer is forbidden to dismiss employees.

According to the Labour Code[4], the employer can not validly terminate the individual employment agreements under circumstances such as: (I) throughout the duration of the temporary disability of the employees, ascertained by a medical certificate according to law, (ii) throughout the period when the female employee is pregnant, to the extent that the employer had knowledge about the pregnancy before issuing the termination decision, (iii) throughout the duration of the maternity leave, (iv) throughout the duration of the leave for raising a child up to the age of 2, and, in case of a disabled child, up to the age of 3, etc.

4 The circumstances under which the employer is forbidden to terminate the employment agreements of its employees are expressly stated under Article 60 of the Labour Code.

The above mentioned prohibitions apply also in case of collective dismissals. Therefore, the employers have to check, prior to issuing the dismissal decisions, whether the affected employees find themselves in any of the circumstances under which the dismissal is forbidden.

The dismissal decisions issued for employees who are under any of the above circumstances may be easily annulled by the courts, if they are challenged by the employees.

In order to avoid such risks, the employers should postpone the issuance of the dismissal decisions for the employees under the above circumstances until the prohibitions cease to apply. Alternatively, the employment agreement may cease trough mutual consent, as permitted by Article 55 (b) of the Labour Code. Through termination by mutual consent[5] both the employer and the employee agree to cease the employment relationships. Therefore, the prohibitions to dismiss do not apply, as they are expressly provided only for the case when the employment relationships are terminated at the initiative of the employer.

Criteria for Dismissal

As shown herein above (page 11), the National CBA provides for certain dismissal criteria, so that the spouse with the higher income, the employees having children in care, the sole family providers etc. would be protected from losing their jobs. Article 81 (4) of the National CBA provides that, if two or several employees find themselves in the same circumstances, the employer must decide who shall be dismissed pursuant to consultations with the unions.

A few practical considerations should be made with respect to these provisions. If an employer has a number of 20 sales representatives in its corporate charts and wants to cut down 10 positions, the measure shall first affect the employees who do not have children in care, who are not sole family providers, who have more than 3 years left until retirement etc. The employers may find it difficult to apply these criteria, as often the very employees who should be affected by dismissal are the ones that the employer would prefer to keep (for being young, for not having family-related obligations etc.).

5 More details on how termination by mutual consent may be used in relation to collective dismissals may be found under the "Voluntary Termination Plan" case study.

However, failure to comply with the dismissal criteria may result in the decision being cancelled in court. Nor can the employer change or add to such criteria through the CBA concluded at the company level or through the internal regulation. Any such change could also be invalidated in the court of law. The second point to be made with respect to criteria for dismissal is that, for employees under the same circumstances, the employer should consult the unions regarding who to dismiss. Consulting the unions does not mean obtaining the approval of the unions, but only informing them of the matter and allowing them to express a point of view. Still, it is preferable that the collective agreement concluded at the company level provide that professional competence is the criterion based on which the employer, through consultations with the unions, will decide what employees will be dismissed.

Voluntary Termination Plan

The employers may choose to implement voluntary termination plans together with or instead of collective dismissals. The voluntary termination plans are offered by the employers who intend to reduce the number of staff but want to avoid the various constraints imposed by the legislation on collective dismissals. The legal basis of voluntary termination plans is Article 55 (b) of the Labour Code, which allows the employer and the employee to terminate the employment by mutual consent. Customarily, this is made in exchange for some financial compensation. In order to be attractive for the employees, the compensations granted under the voluntary termination plan should be higher than the severance payments that the employees would be entitled to if they were dismissed.

As aforesaid, by implementing a voluntary termination plan, the employers may circumvent the applicability of the legal provisions regulating the collective dismissal procedure: the employers are not bound by the legal deadlines (up to 100 days, according to the Labour Code and the National CBA, and even more in some CBAs), the prohibitions to dismiss do not apply, nor do the criteria for dismissal indicated above. Besides, the employer may keep the positions in the corporate chart and is not compelled to re-offer them to the former employees when it intends to fill them. From a strictly legal perspective, the unions do not play any role in the implementation of a voluntary termination plan. However, it is advisable that the unions should be informed and consulted about the plan, which often increases the chances of success thereof.

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