

Considerations on the freedom to work

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Abstract

The concept of the freedom to work has, or, at least, should have, a very broad meaning. We believe that this concept refers to both the freedom to choose a job (or not to work) and the right, had by every citizen of an EU Member State, to move to other Member States to seek and accept a job in those countries, without discrimination, regardless of the country of origin, the level of education, gender or any other discriminatory criteria, under the same conditions as the nationals of that State. Discrimination is basically a restriction of the freedom to work or even its total annihilation. Freedom to work also requires another aspect, namely the prohibition of forced labour, considered a crime by the criminal laws of all the EU Member States. Only understood together, these issues can highlight the true dimension of the freedom to work.

Keywords: *freedom to work, forced labour, human rights, right to work*

PRELIMINARIES

The fundamental principles governing the labour relationships are expressly set out in the Romanian Labour Code, Title I, Chapter II (Articles 2-9). Moreover, these principles are also outlined in the literature [1] and in domestic and international provisions regarding the recognition of and guaranteeing the fundamental human rights in the European Union norms and in the conventions and recommendations of the International Labour Organisation, and in the rules of international labour law. The human rights can be divided into civil and political, economic, social and cultural rights. Some rights that are considered 'mixed' are added to the already mentioned ones, such as the right to freedom of association, considered as a civil and a political right at the same time.

The freedom/right to work

The provisions of Article 3 paragraphs (1) and (2) of the Romanian Labour Code state, 'The right to work is guaranteed by the Constitution. The right to work may not be abridged. A person shall be free to choose his/her job and profession, trade or activity to perform'. According to this principle, anyone is free to work, anywhere in Romania or in the Member States of the European Union without administrative conditionality. These provisions resulting from the Article 3 paragraph (2) of the Labour Code are consistent with the provisions of the International

Covenant on Economic, Social and Cultural Rights, which, in Article 6 paragraph 1 state that the right to work includes the right of everyone to earn a living by work freely chosen or accepted. The Romanian Constitution recognizes the nature of a fundamental right of the right to work, stipulating at Article 41 paragraph (1): 'The right to work can not be restricted. Choice of profession and employment are free'. We can notice that, unlike the constitutional provision which refers to the 'right to work', the Labour Code refers to freedom to work.

The general theory of law admits that 'the idea of right' presupposes a correlative obligation. The notion of 'freedom' does not imply a corresponding obligation, so it was accepted [2] that the constitutional provision must be interpreted as freedom and not as a right, as the state's correlative obligations do not include that of ensuring a place of work. The freedom to work enables free choice of employment and profession, occupation, work, and the freedom not to work effectively prohibits the state or any other person to compel someone to work.

The principle of freedom to work is also found in the Universal Declaration of Human Rights, which, in Article 23 paragraph 1 'proclaims that everyone has the right to work, to free choice of profession and type of work, to just and favourable conditions of work performance'.

Everyone has the right to appropriate facilities for vocational guidance, in order to help him choose an occupation suited to his personal aptitude and interests. [3]. No one can be denied access to appropriate facilities for vocational training. [4].

According to Article 15, paragraph (1) of the Charter of the fundamental rights of the European Union, 'Everyone has the right to engage in work and to pursue a freely chosen [5] or accepted occupation' [6], having the right to same working conditions as other citizens of the EU. The expression "working conditions" must be understood in the sense of Article 156 of the Treaty on the Functioning of the European Union [7]. Article 156 (ex Art. 140 TEC) states that the Commission shall encourage cooperation between the Member states and facilitate the coordination of their action in all social policy fields, particularly in matters relating to: employment; labour law and working conditions; basic and advanced vocational training; social security; prevention of occupational accidents and diseases; occupational hygiene, the right of association and collective bargaining between employers and workers. An essential component of the recognition of the freedom to work is also the recognition – in the Charter, at the same Article 15, paragraph (2) – of the freedom of the

workers' movement, the freedom to seek employment, to work, to exercise the right of establishment and to provide services in accordance with Articles 26, 45, 49 and 56 of the Treaty on the Functioning of the European Union. The freedoms to which we referred above assume no discrimination based on nationality, regardless of the nationality of the person (if originating from a Member State). The only limitations that can be made are those arising from reasons of public policy, public security or health [8]. Without these limitations, the worker has the right to accept offers of employment, to move freely – in order to work – on the territory of any Member State; to stay on the territory of a Member State in search of work, in conditions similar to those of the citizens of the Member State; to remain in the Member State after having been employed.

The right to work was also guaranteed by the provisions of Article 2 of the previous Romanian Labour Code adopted before 2003, which provided that any citizen had the right to conduct business in a particular area, according to his ability and/or training, depending on the needs of the whole society.

The principle of freedom to work can not be violated, even if an agreement between the contracting parties is signed, such an agreement being null and void.

The freedom of individuals to work does not imply the employer's obligation to employ any person, without personnel selection. The only restrictions on exercising the right to work can be provided by special laws designed to protect the employer or the employee. For example, the non-compete clause envisages a restriction on the freedom to work, the employee being required not to work for the competition. [9]

Under the provisions of Article 41 of the Romanian Constitution, the right to work can not be restricted, and the choice of profession and employment is free.

The existence of the right to work does not imply the obligation to work, such an obligation being removed in Romania with the abrogation of the Law no. 25/1976 and the Decree no. 153/1970, after December 1989.

Nowadays, in Romania, because the Romanian Constitution specifically refers only to the fact that the right to work can not be restricted, without providing a citizen with a working place by the competent agencies of the State, we cannot talk about guaranteeing the right to work, but we can talk about the possibility to work, if the citizen finds himself a job.

Under the provisions of the Decree no. 153/1970, all individuals able to work were obliged to perform a socially useful activity. Those who were able to work but

refused to do so could be sentenced to up to 6 months in prison for this offence. Work had therefore the legal physiognomy of an obligation for those with a working capacity until their retirement. The State was required to provide every citizen a job that was as much as possible according to their training and skills.

Currently, the regulation of the right to work does not mean the obligation to work; each person is free to choose the option to work or not to work, forced or compulsory labour being prohibited. Moreover, the State, through its institutions, including the education and training ones, no longer takes any responsibility in providing employment for graduates. The European Social Charter provides that, for the effective exercise of the right to work, the parties (employer and employee) are committed to achieving and maintaining the highest and most possible stable full-time employment, protecting the worker's right to earn a living through honest and freely undertaken work [10].

Freedom to work necessarily also involves prohibiting any form of discrimination. Under the provisions of the European Convention on Human Rights [11], exercising any right provided by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

The Romanian legislation prohibits any direct or indirect discrimination among employees, discrimination which may occur for reasons such as: gender, nationality, age, race, ethnicity, religion, political orientation, social origin, disability, membership or trade union activity, sexual orientation. By discrimination one should understand any distinction, exclusion, restriction or preference based on race, nationality, ethnicity, language, religion, social status, beliefs, sex or sexual orientation, membership of a disadvantaged group or any other criterion which aims or affects the restriction or elimination of recognition, enjoyment or exercise, under equal conditions, the human rights and fundamental freedoms recognized by law in the political, economic, social, cultural or any other field of public life. At Article 6, the Government Ordinance no. 137/2000 lists as grounds for discrimination the following: belonging to a certain race, nationality, religion, social or disadvantaged category, because of beliefs, age, sex or sexual orientation of a person. Any such discrimination in an *employment relationship and social protection*, except the cases provided by law, falls under the order mentioned and shall be considered an offence.

Discrimination can arise in a worse treatment granted to an employer on one or more of the above considerations, in any employment relationship. Such relationships are, as listed by law:

- a) completion, suspension, modification or termination of employment;;
- b) establishing and modifying duties, employment or wages;
- c) providing other social rights than those representing the salary;
- d) professional training, reconversion or promotion;
- e) enforcement of disciplinary measures;
- f) the right to join a union and access to the facilities it grants;
- g) any other conditions of work performance, according to law.

In conclusion, we can say that in Romania, guaranteeing the right to work is a reality, but this guarantee of a right does not imply the guarantee of a working place. Under the conditions of a free market economy, it would be difficult for a state to require all its citizens capable of work to carry out such an activity. For this thing to happen, it would be necessary for the state to assume the obligation to provide, to find anyone able to work a job, which would be very difficult, especially when the majority of the traders on the market are private individuals. Through its institutions, the State is only able to take economic measures to provide certain facilities, tax exemptions, etc., so as to stimulate the creation of new jobs and reduce the number of unemployed, especially in situations of economic recession.

In modern law work is no longer seen as a 'commodity' that the employee 'sells' to the employer. Labour law is part of both private and in public law due to the penalties it contains. The trend that currently exists is to place labour law under the umbrella of private law. Providing real freedom to labour implies the possibility of negotiating the employment contract. According to the principle of negotiation, for the purposes of good labour relations, the participants of the labour relations will inform and consult each other under the conditions of law and collective employment agreements. Article 6 of the European Social Charter states that all workers and employees have 'the right to bargain collectively'. Article 28 of the European Charter on Fundamental Rights provides the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interest, to take collective action to defend their interests, including strike action. Also, workers are entitled to be informed, in good time in the cases and under the conditions provided for by the Community law and national laws and international practices, and

consulted about the company's problems. [12]. Workers have the right to take an active part in improving the environment and working conditions within the company they work in [13].

PROHIBITION OF FORCED LABOUR

As we have already shown, there is an inextricable link between the freedom to work and the prohibition of forced labour. Moreover, the literature in the field of labour law, most often, does not analyze separately forced labour.

A person is free to work (or not to work) anywhere in Romania or on any territory of the Member States of the European Union without administrative conditionality, so it becomes obvious that no one can be forced to work.

According to Article 5 of the European Convention on Human Rights: 'No one shall be held in slavery or servitude' [14], and '*no one shall be required to perform forced or compulsory labour*'. [15]

According to Article 4 of the Romanian Labour Code: '*Forced labour shall be prohibited*'. 'Forced labour' means any work or service imposed on a person under threat or for which he/she did not freely express his/her consent.

It is not considered forced labour or activity imposed by public authorities:

- a) the fulfilment of the civic duties established by law;
- b) the work done by a person on the basis of a final judicial conviction or during probation, under the terms of the law;
- c) the work carried out in case of an act of God, respectively war, disasters or disaster danger such as: fire, flood, earthquake, serious epidemic and epizootic, animal or insect invasions and, generally, in all circumstances threatening the life or the normal living conditions of the entire population or a part of it.

Another situation which is not considered forced labour is military service or any other service when military service is denied due to reasons of conscience in the countries where this is recognized as legitimate (it is not the case in Romania where compulsory military service was repealed).

The fundamental law, Article 42 paragraph (1) provides that forced labour is prohibited.

At the international level, the International Labour Organisation Convention concerning Forced or Compulsory Labour no. 29/1930 founded the prohibition of

forced labour, stating that the absence of a legal obligation to work is a guarantee of the freedom not to conduct such an activity.

Since the right to work is regarded as an expression of human freedom and personality, it is considered that a person can not be compelled to perform the work which he has not chosen, or not accepted freely or to work somewhere where he has not accepted freely. No one may be compelled to work or not to work in a particular job, in a particular profession.

The Romanian Labour Code, at Article 4 paragraph (1), states that forced labour is prohibited. According to the provisions of paragraph (2) of the same article, the expression 'forced labour' means 'any work or service imposed on a person under threat or for which he/she did not freely express his/her consent'.

In the new statutory of contravention the provision of the community service is also introduced as a sanction, but such a penalty can not be imposed unless the offender consents to the sanction, solution derived from the view that human rights and freedoms should have priority, including the right to work, not the obligation to work, even if the obligation is determined by a final sentence of conviction [16]. It follows, the author concludes, that if the summoned offender is absent from the proceedings, the court has no right to replace the penalty of imprisonment for minor offences, applied as the result of the transformation of the unpaid fine within the legal period of time.

Forced labour is seen as a crime in all modern European penal codes. The new Romanian Penal Code criminalises forced or compulsory labour in Article 212, which states, 'The act of subjecting a person, in cases other than those provided for by law, to perform work against his will or compulsory labour is punishable with imprisonment from one to three years'.

References:

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- [3] European Social Charter from 1961 (ratified by all member states), pct. 9
- [4] European Social Charter, pct. 10
- [5] ECR 491 Case 4/73 *J. Nold*, 1974; ECR 3727 Case 44/79 *Hauer* 1979
- [6] Paragraph (2) of the same article states that 'Every citizen of the Union has the freedom to seek employment, to work, to exercise the right of establishment and to provide services in any Member State'; according to paragraph (3) 'Nationals of third countries who are authorized to work in the territories of the Member States are entitled to working conditions equivalent to those of citizens of the Union'.
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