# DISCRIMINATION IN THE WORKPLACE - AN ANALYSIS OF THE CASE LAW OF THE ROMANIAN NATIONAL COUNCIL FOR COMBATING DISCRIMINATION ON WRONGFUL TERMINATION OF THE INDIVIDUAL EMPLOYMENT CONTRACT

**Lecturer Dana VOLOSEVICI, PhD.**
Petroleum-Gas University Ploiesti
*dana.volosevici@vplaw.ro*

***Abstract***
*Discrimination in the workplace takes the form of a variety of behaviours, which could come from colleagues, subordinates and superiors. The acts are all the more serious in cases where the employer, taking advantage of the inequality of the parties in the legal employment relationship, distorts the provisions of the Labour Code, using them to create a situation affecting the employee's rights or an intimidating, hostile, degrading or offensive environment, in order to force the employee to terminate the employment relationship. This article presents the case law of the Romanian National Council for Combating Discrimination in the field of access to employment and profession, presenting some relevant cases of discrimination perpetrated by abusive application of the legal provisions on dismissal for reasons unrelated to the person of the employee, disciplinary dismissal, reinstatement of the unlawfully dismissed employee and termination of the employment contract at the initiative of the employee.*
***Keywords****: discrimination, harassment, employment, dismissal*

The field of employment relations is an area in which discriminatory and abusive manifestations still reach a significant level, despite legislative efforts to prevent and punish such acts. At European level, the Directive 2006/54/EC [1] provides the legal framework for the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation; the Directive 2000/43/EC [2] implements the principle of equal treatment between persons irrespective of racial or ethnic origin, while the Directive 2000/78/EC [3] lies down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment. Romania has transposed the abovementioned European legislation into two specific laws – the Government Ordinance no. 137/2000 on the prevention and sanctioning of all forms of discrimination [4] and the

Law nr. 202/2002 on equal opportunities and equal treatment of women and men [5]. The Romanian Labour Code prohibits various forms of discrimination, namely direct discrimination, indirect discrimination, discrimination by association, harassment and victimization. Discrimination can occur in relation to all aspects of the employment relationship, from recruitment to the treatment of former employees, both in normal working conditions and in times of crisis, such as the COVID-19 pandemic, when the Government (secondary legislator), rushing to counter the effects of the crisis, establishes a discrimination not provided for by the law issued by Parliament (primary legislator) [6].

Despite the existence of a constantly improving legal framework, according to statistics published by the National Council for Combating Discrimination (N.C.C.D.) [7], petitions registered in the field of "access to employment and profession" are constantly in first place, representing 36.65% of the total number of petitions in 2022. The criteria invoked were, in descending order of petitions filed, social category, other (including status as a person reintegrated following a process with the complainant company), gender, age, disability, chronic non-contagious disease, ethnicity, language, beliefs, religion, HIV, sexual orientation, nationality, race.

An analysis of the case law of the N.C.C.D. in the field of "access to employment and profession" reveals that a number of acts have been committed in connection with the abusive interpretation of certain provisions of the Labour Code, which regulate the dismissal of the employee and his reinstatement.

The acts consisted of both actual discrimination and harassment. It should be recalled that, for an act to be considered discrimination, there must be a differentiation based on a criterion which infringes a right. According to ECHR case law, to prove differentiation, „it must be established that other persons in an analogous or relevantly similar situation enjoy preferential treatment, and that there is no reasonable or objective justification for this distinction” [8]. The ECHR stated that Contracting States enjoy a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment in law [9].

It should be noted that a peculiarity of the act of harassment, as regulated by the provisions of G.O. no.137/2000, is that it does not presuppose the existence of analogous, comparable situations. The mere fact that the employer has engaged in

certain conduct which may be related to one of the criteria laid down by law, conduct which has the effect of creating an intimidating, hostile or degrading environment for the complainant, is a necessary and sufficient condition for the existence of the act of discrimination provided for and penalised by Article 2 para. (5) of G.O. no 137/2000. This legislative choice derives from the fact that harassment in itself is wrong because of the form it takes (verbal, non-verbal or physical abuse), and the potential effect it can have, namely the violation of human dignity.

With regard to dismissals, a significant number of cases arise from the misuse of the provisions of Article 65 of the Labour Code, which governs dismissal for reasons not related to the employee's person. According to the legal provisions, the termination of the individual employment contract is determined by the removal of the job position for one or more reasons unrelated to the employee's person.

The courts have held that "the basic idea is that the removal of the job position, which also entails the dismissal of the employee, must not conceal any reason other than the employer's genuine need" and that "the purpose (cause) of the removal of the job position cannot be the exclusion of the unwanted employee" [10].

As regards the conditions expressly established by the article 65 para (2) of the Labour Code - „the removal of the job position must be effective and have a real and serious cause", the Constitutional Court stated that „those conditions seek to strike a balance between the two parties to the employment contract, that is to say, between the need to ensure that the employer is free to decide whether to terminate employment when objective considerations so require - economic difficulties, technological change, reorganisation of the business, etc. - on the one hand, and the need to protect the employee from any abusive attitude on the part of the employer, on the other. For these reasons, the law requires not only that the termination of employment be effective, but also that it be justified by a real and serious cause or, in other words, that it be determined by an objective cause, of a certain seriousness that really requires this measure. The phrase "real and serious cause" evokes facts, determinable hypotheses that exclude subjective approaches. The cause is real when it is objective, being imposed by the need to overcome technical and economic difficulties, by the economic imperative of increasing labour productivity and adapting to new technological developments. The cause is serious

when the situation of the employer's unit is serious, threatening its development or even its viability" [11].

The summary regulation of this cause of dismissal encourages abuses by some employers who distort the purpose of the legal regulation in order to eliminate those employees who become undesirable in the workplace. In addition, in an appeal in the interest of the law, the High Court of Cassation and Justice ruled that, in the case of dismissal for reasons not related to the employee's person, it is not mandatory to list all available jobs in the establishment and the deadline for employees to opt for a vacant job [12]. It therefore follows that the effect of removal of the job position is to dismiss the employee, even if there are other vacancies in the establishment.

One of the recent cases before the N.C.C.D. [13] concerns the dismissal of an employee by removing the position in question, in the absence of any justification from the employer, in view of the vulnerable situation in which the employee concerned found herself, in the light of her chronic illness, her classification as disabled and her age of over 50. The employer did not indicate that persons in similar situations were subject to the same legal consequences, without a causal link to certain personal characteristics such as health or age. N.C.C.D.'s Board found the existence of the multiple acts of discrimination pursuant to the provisions of Article 2 para. (1), Article 2 para. (6) and Article 7 lett. a) of the G.O. no. 137/2000.

In another case [14], the dismissal for reasons unrelated to the employee concealed discrimination on the grounds of maternity and was organised in such a way as to appear to comply with the maternity protection measures imposed by the relevant legislation. N.C.C.D.'s Board found that the complainant was discriminated against and harassed on the basis of maternity during her two pregnancies and during her prenatal, postnatal and parental leave for her two children. Thus, the complainant pointed out that the position she held following the selection and recruitment process was changed, removed, within the period of maternity protection and that on her return from statutory leave, her duties and responsibilities were significantly reduced, and she was assigned to other commercial areas.

The Board found that the complainant's job position, which she had held and filled through a competition, had been removed on the basis of performance appraisals for the

period during which she had not held the post, being on maternity leave, child-raising leave and during the statutory maternity protection period. For these reasons, the Board found that the complainant did not receive equal treatment in the field of employment and professional practice and that the complainant's job position was removed for unsatisfactory performance without any responsibility on the part of the complainant. Moreover, the complainant was retained in the respondent's position only to comply with the legal provisions and, as soon as the legal deadlines expired, the complainant was dismissed.

The case presented is all the more interesting because the employer, in its discriminatory actions, invoked for dismissal both reasons related to the application of Article 65 of the Labour Code and reasons related to the employee's lack of performance. Acts of discrimination can also be disguised as disciplinary dismissals. The employer, according to the provisions of Article 247 para. (1) of the Labour Code, has the disciplinary prerogative, having the right to apply, according to the law, disciplinary sanctions to its employees whenever it finds that they have committed a disciplinary offence. At the same time, under Article 7(e) of G.O. no. 137/2000, acts of discrimination by the employer, manifested when applying disciplinary measures, constitute a contravention whenever an employee is discriminated against on the grounds that he belongs to a particular race, nationality, ethnic group, religion, social category or disadvantaged category, or on the grounds of his beliefs, age, sex or sexual orientation, in a labour and social protection relationship, except in the cases provided for by law.

In one case [15], the complainant alleged that he had been disciplined for acts relating to the establishment of a trade union of which he was president. The complainant also alleged that during the same period, out of a total of about 400 employees, 19 employees were dismissed, the official reason invoked by the employer being reorganisation. However, all 19 of those dismissed were union members. The petitioner claimed that all the respondent's actions had one purpose, namely the dissolution of the union, the first action being the dismissal of the petitioner on the false ground of disciplinary misconduct, which was confirmed by a decision of the Ilfov Tribunal. Despite the decision, the employer refused to enforce a court ruling, denying him his right to work and dignity on the grounds that he would be a danger to flight safety. From the date of

reinstatement until the date of the referral to the N.C.C.D, the complainant did not receive his service badge, uniform, access to the company's computer system, and flight or training duties as per his job description. Instead, he was remunerated according to his contractual basic salary, which was the lowest part of the complainant's salary. In addition, the employer's decision to exclude him from the IT system prejudiced his right to use the employee ticketing system (Private Travel) and the benefits included, causing him financial loss.

The N.C.C.D. Board found that by dismissing the complainant, the employer had acted actively, with effects that unduly disadvantaged the members of the trade union of which the complainant was the president, the provisions of Article 2 para. 4 of G.O. no. 137/2000 being fully applicable.

The Board decided to impose a fine of 1,000 lei for the effects of the treatment that led to the dismissal of the complainant on trade union grounds, taking into account the following: the relevant European Union directives (e.g. Council Directive 2000/43/EC, Article 15) and the case law of the European Court of Justice require the Member States of the European Union to apply effective, proportionate and dissuasive sanctions; the discrimination was aimed at stopping the trade union movement, which is an extremely serious offence.

Some of the discrimination cases relate to the employer's obligation to reinstate the unlawfully dismissed employee. Thus, according to Article 80 of the Labour Code, if the dismissal has been carried out unjustly or unlawfully, the court will order its annulment and, at the request of the employee, will restore the parties to the situation prior to the issuing of the dismissal act.

Article 287 para.1 lett. d) of the Criminal Code provides that failure to enforce a court decision ordering the reinstatement of an employee constitutes a criminal offence and is punishable by imprisonment from 3 months to 2 years or a fine.

In order to avoid criminal liability, some employers start the process of reinstating the employee, but divert it from its legal purpose. In this way, employees are created with unfit working conditions in order to induce them to terminate the employment relationship by resignation. In this case, the criterion of discrimination is, according to the case law of the N.C.C.D, "the situation of a person reintegrated following a process with the company

complained of", which belongs to the category "any other criterion"[16]. Indeed, according to Article 2 para. 5 of the G.O. no. 137/2000, constitutes harassment and any behaviour based on race, nationality, ethnicity, language, religion, social category, beliefs, gender, sexual orientation, membership of a disadvantaged group, age, disability, refugee or asylum seeker status or any other criterion that leads to the creation of an intimidating, hostile, degrading or offensive environment is punishable. In the judgments cited, the N.C.C.D decided that "the treatment described by the complainant creates a hostile and degrading environment for the complainant, on the basis of her situation as a person reintegrated following a process with the complainant society".

The attitude of employers is all the more serious since, as the Constitutional Court has pointed out, contractual employment relationships, by their nature, involve significant human interaction [17]. The evolution of this interaction after an unfair dismissal can be significantly damaged, so as to lead to a decision to leave a job, regardless of the safeguards that national regulations provide for the employee to protect his rights by sanctioning abusive attitudes of the employer [18].

The abusive acts committed by employers, as reflected in the case law of the N.C.C.D, can be manifested through a wide range of actions. In a recent case [19], the N.C.C.D's Board noted that the complainant's reinstatement after winning a court case against her employer concerning her dismissal and harassment resulted in hostile behaviour towards her. Thus, the complainant was not provided with working tools for the performance of her duties (inadequate office, access to ERP software, etc.), her job description was altered by restricting her duties, which led to her isolation, the creation of a negative image in the workplace, the deprivation of her right to work in accordance with her professional training and her individual employment contract, and the creation of an intimidating, hostile, degrading and offensive environment.

In another case [20], the facts consisted in subjecting the reinstated employee to degrading, unfair and humiliating treatment, being forced to manually tear the drafts of her colleagues into pieces smaller than 1 cm, this work being closely supervised; she was presented as a negative example, showing other employees what could happen to them if they had the courage to defend their interests in court against their employer; the complainant's office was placed at a distance from the offices of her colleagues; she was

not given access cards to other areas of the employer, similar to her colleagues, so she did not have free access to the lunch room; compared to other employees, she had to hand in her mobile phone, USBs, CDs at the end of her working time; a similar practice was not applied against other colleagues, the secretary employed in her place was treated completely differently.

To give an example from the sphere of public administration [21], the job of the legal adviser, reinstated following several foreclosure procedures, was located in the office of the librarian of the institution, at a school desk, surrounded by children present in the library to access the BIBLIO-NET program, without access to the means necessary to carry out the work and perform the duties set out in the job description.

Another case of abusive conduct by the employer is harassment of the employee with a view to inducing him to resign or terminate the employment contract under Article 55(b) of the Labour Code, following the agreement of the parties. Of course, in both cases the employee's consent is vitiated, being obtained by psychological violence. By way of example, in a recent case [22], the complainant stated that she had decided to terminate her individual employment contract following numerous hostile and humiliating attitudes on the part of her employer. These attitudes were exemplified by the use of a raised tone, throwing documents at the complainant, restricting her right of reply and the right to express her opinion. The employer refused to pay her outstanding salary entitlements and, in response to the employee's repeated requests for her rights to be respected, sent an email to several employees in which he used a series of abusive expressions likely to damage her dignity, reputation and honour.

In view of the content of the email, the N.C.C.D’s Board decided that the statement was likely to undermine the dignity of the complainant and create an intimidating, hostile, degrading, humiliating and offensive atmosphere against her on the basis of her gender. Such statements, according to ECHT case law, are not protected by the right to free expression. Thus, the employer's action constitutes discrimination, since it created a distinction on the basis of gender which had the purpose and effect of restricting the equal exercise of the right to dignity.

As is evidenced by the cases presented in this article, a large part of the acts of discrimination concerning termination of employment are aggravated by the violation of

other legal provisions, such as those concerning maternity protection, freedom of association and trade union membership, the right to exercise trade union activities, the objectivity and legality of professional evaluation, or the modification of the individual employment contract. The inequality of the parties in the employment relationship and the legal subordination of the employee encourage the misconduct of some employers and the misuse of the provisions of the Labour Code. From the Council's case law, it appears that this type of acts are committed by all categories of employers, public and private, with foreign or Romanian capital participation, small, medium and large, which demonstrates the seriousness of the problem under analysis and requires the application of stronger measures to combat discrimination in employment relations.

**References:**

[1] Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), OJ L 204, 26.7.2006, p. 23–36.
[2] Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ L 180, 19.7.2000, p. 22–26.
[3] Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303, 2.12.2000, p. 16–22.
[4] Republished in the Official Gazette of Romania, Part 1, no.166 of 7 March 2014.
[5] Republished in the Official Gazette of Romania, Part 1, no. 326 of 5 June 2013.
[6] For such an example, see Silviu-Dorin Șchiopu, Considerații asupra constituționalității unor prevederi din Legea nr. 55/2020 cu impact asupra legalității întrebuințării în context intern a certificatului digital al UE privind COVID, Revista „Dreptul" (Law Review) nr. 4/2022, p. 58-59.
[7] National Council for Combating Discrimination, 2022 Activity Report, available at https://www.cncd.ro/wp-content/uploads/2023/08/Raport-de-activitate-CNCD-2022-EN-R2-interactiv.pdf.
[8] ECHR, Fredin v. Sweden (no. 1) judgment of 18 February 1991, Series A no. 192, p. 19, para. 60; Stubbings and others v. The United Kingdom, judgment of 22 October 1997, para. 72.
[9] ECHR, Rasmussen v. Denmark judgment of 28 November 1984, Series A no. 87, p. 15, para. 40; Stubbings and others v. The United Kingdom, judgment of 22 October 1997, para. 72.
[10] Pitești Court of Appeal, Civil Decision no. 449/17.03.2020.
[11] Constitutional Court of Romania, Decision no. 420/2013, published in the Official Gazette of Romania, Part 1, no. 48 of 21 January 2014.
[12] High Court of Cassation and Justice of Romania, The Competent Court to Judge Appeals in the Interest of the Law, Decision no 6 of 9 May 2011 on appeals in the interest of the law, on the applicability of the provisions of Article 74 para. (1) letter d) of the Labour Code in the case of dismissals for reasons unrelated to the employee's person, published in the Official Gazette of Romania, Part 1, no. 444 of 24 June 2011.
[13] National Council for Combating Discrimination, 2022 Activity Report, p. 40.
[14] National Council for Combating Discrimination, Decision no. 520 of 31 August 2022.
[15] National Council for Combating Discrimination, Decision no.330 of 27 April 2016.
[16] National Council for Combating Discrimination, Decision no. 709 of 04 December 2013, National Council for Combating Discrimination, Decision no. 255 of 25 March 2020.
[17] Constitutional Court of Romania, Decision no. 279 of 23 April 2015, published in the Official Gazette of Romania, Part 1, no. 431 of 17 June 2015, para. 34.
[18] Constitutional Court of Romania, Decision no. 401 of 18 June 2020, published in the Official Gazette of Romania, Part 1, no. 906 of 6 October 2020.
[19] National Council for Combating Discrimination, Decision no. 728 of 7 December 2022.

[20] National Council for Combating Discrimination, Decision no. 709 din 04 December 2013.
[21] National Council for Combating Discrimination, Decision no. 255 of 25 March 2020.
[22] National Council for Combating Discrimination, Decision no. 661 of 02 November 2022.