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WORKERS' REPRESENTATIVES

A. Hurbean

Ada Hurbean
Law and Social Science Faculty, Legal and Administrative Science Deparment
"1 Decembrie 1918" University, Alba Iulia, Romania
*Corespondence Ada Hurbean, "1 Decembrie 1918" University, 5 Gabriel Bethlen St., 510009, Alba Iulia, Romania
E-mail adahro@yahoo.com

Abstract

This study deals with the institution representatives of the employees, the only possibility, regulated by the law, to defense and promotion the interests of employees, in the absence of a trade union representative at the level of the unit. Therefore, we are in the presence of alternative to trade union representation, whereas, in principle, coexistence between the two is out of the question.

Topics studied has known substantive changes with the entry into force of the Law No 40/2011, both in respect of the conditions of eligibility of representatives of the employees, as well as in respect of measures of legal protection for them. Therefore, we want to do a comparative overview of the old and new provisions equal in the matter.

Keywords: *empoyee, representation, trade union, colective agreement, mandate, responsabilities.*

Introduction

Nowadays, the institution of the workers' representatives is regulated by Articles 221-226 Labor Code. Law no. 40/2011 has brought important changes regarding the old stipulations in matter. In principle, these changes refer to the eligibility requirements, conditions that must be met in order to elect the workers' representatives, and also to the protective measures instituted in their favor.

As it had been shown by the special literature[1], the workers' representatives are an alternative to the trade unions, being elected, at the employer's level, only if there are no unions. Law no. 40/2011 has brought an important clarification in the terminology of labor relationships, because, initially, Article 224 paragraph (1) Labor Code required the appointment of workers' representatives in the units that had no union members. Therefore, this way of representing the employees may coexist with the classic one, the representation by a trade union, as long as that union is not representative. Related, and reported to Article 223 (e), the negotiation of the collective labor agreement is one of the special duties of the workers' representatives.

In this context, the wording of Article 221 Labor Code gave birth, with reason, to some contradictory opinions in the specialized legal literature. Thus, it has been enforced the idea that these provisions are mandatory[2], respectively: the appointment of the workers' representatives is compulsory for the employers that have more than 20 employees and where is no representative union. The opposite opinion[3], that cannot be ignored either, refers to the

[1] In this regard, Al. Țiclea, *Reprezentanții salariaților*, in *Revista Română de dreptul muncii*, nr. 1/2004, p. 24.
[2] R. G. Cristescu, C. Cristescu, *Codul muncii modificat şi republicat. Analize şi soluții*, Hamagiu Pubishing House, 2011, p. 324.
[3] I.T. Ștefanescu, *Tratat de dreptul muncii*, Wolters Kluwer Pubishing House, 2007, p. 109.

wording of the concerned article: "for the employers with more than 20 employees and where is no representative union organizations created according to the law, the employees' interests *may* be promoted and defended by their representatives…". According to this opinion, it is obvious that the existence of the workers' representatives is not obligatory. The law has set up a possibility and not an obligation for the employees to choose their representatives. Indeed, the legal regulation of the institution of the workers' representatives can be found only in the Labor Code. From the interpretation of this regulation it can result only one conclusion: we find ourselves in the presence of a suppletive norm.

Conversely, both the Labor Code4 and Law no. 62/2011, the social dialogue law5, impose the compulsory negotiation of the collective labor agreement at the unit level for employers with at least 21 employees. The social dialogue law states that the negotiation of the collective labor agreement can be made by the workers' representatives only in the units where either representative trade unions do not exist or there are unaffiliated trade unions to a federation trade union that is representative for the sector to which the unit belongs. Therefore, we ask ourselves how this legal obligation, to negotiate the collective labor agreement (in units with at least 21 employees), can be fulfilled, in default of a union representative and of the workers' representatives, better said, in the absence of a party. Thus, we believe that the wording of Article 221 Labor Code should be reconsidered, so that the two legal texts to correspond to each other. More specifically, to establish mandatory election of the workers' representatives in units with more than 20 employees, so that the obligation of negotiation of the collective labor agreement to be respected in the same units.

Returning, the role of the workers' representatives is to promote and defend the interests of the employees from the unit, having a similar role to that of the trade unions, even if the ways of action are not the same, since they are special mandated for this purpose. The length and limits of the mandate, according to Article 224 Labor Code, are established in the general assembly of the employees, the same assembly that elects these representatives. Thus, as noted before, in the legal doctrine[6], the relationships between the workers' representatives and the employees that chose them are based on the contract of civil mandate, the mandate of these representatives being a special one.

Specifically, according to Article 221 paragraph (1), the workers' representatives are elected during the general assembly of employees by vote of at least half of all employees regardless of the number of participants at the meeting. The number of employees includes all categories of employees, regardless of the type of the employment contract.

Also, Article 221 paragraph (2) stipulates that the number of elected representatives of the employees shall be established by mutual agreement with the employer, in proportion to the number of employees. This agreement is not demanded, for example, when nominating these representatives.

The conditions that must be fulfilled by an employee in order to be elected as representative have been modified once that Law no. 40/2011 entered in force. In the initial settlement of the Labor Code, only the employees aged at least 21 years old and that have worked for the employer for at least one year without breaks could have been chosen as workers' representatives[7]. Currently, the only condition that has to be fulfilled is that of full capacity of exercise, respectively the age of 18. Thus, it was removed the existent discrepancy

[4] Article 229 paragraph (2).
[5] Article 129 paragraph (1).
[6] I. T. Ştefănescu, *op. cit.*, p. 111.
[7] The establishment of some special age conditions for the exercise of certain functions or tasks is not an isolated fact. It is required by a number of normative acts that have a special character, for example, according to Law no. 22/1969, in order to fill the position of administrator, a person must be at least 21 years old, must have not been convicted for offenses against property and must have the necessary professional knowledge.

between the conditions to be met in order to be elected in the management bodies of the trade unions and the necessary conditions to be elected as workers' representative. On the contrary, Law no. 62/2011 stipulates that the persons that enjoy the full capacity of exercise and that do not execute the additional punishment for prohibition of the right to occupy a certain function may be elected in the management bodies of the trade unions. In the same context, it should be noted the fact that even minor workers, aged of 16 or over, may be members of a trade union.

In this context, two remarks are necessary. Firstly, according to stipulations of Law no. 319/2006 for work safety and health, the persons designated by the employees to represent them on issues related to safety and health at work cannot act as workers' representatives[8]. Secondly, the employees occupying managerial positions cannot be elected as workers' representatives, just as well as they cannot be union members[9].

The length of the mandate for the workers' representatives, as stipulated by Article 222 paragraph (3), may not exceed two years. This is a maximum length, so it can be less than 2 years. In fact, the general assembly of employees, once with the appointment of the workers' representatives intentionally mandated to defend and promote their interests, will also establish: the length and limits of mandate, the duties of the workers' representatives and the way of their fulfillment. Yet, the general assembly of employees cannot establish for their representatives tasks that are specific for the trade unions, as provided by law[10]. Because the law does not specify whether the workers' representatives may or may not obtain a second mandate, we consider that nothing prevent the same persons to be elected to represent the interests of employees for another, possibly, two years.

The legal stipulations on time spent by the workers' representatives to exercise their mandate have supported some changes in relation to the initial settlement of the Labor Code. Thus, according to Article 224 Labor Code (as amended by Law no. 40/2011) the facilities accorded to the workers' representatives regarding the time required to fulfill the mandate were eliminated. It was established that the number of hours within the normal working hours necessary for the fulfillment of the mandate they received is determined by the applicable collective labor agreement or, failing that, through direct negotiation with the unit's management.

Contrariwise, the situation of the elected members in the executive bodies of the trade union, who also work in the unit, is more severely regulated by Law no. 62/2011. On this basis, the trade union leaders are entitled to a monthly reduction of the working program by a number of days necessary for the development of the trade union activity, under the conditions negotiated by the collective labor agreement at the unit level. The employer has no obligation to support their salary rights during the time in question.

By the comparative analysis of the two legal texts, we conclude that the workers' representatives may be paid by the employer during the period of time that they perform their duties with which they were invested by the employees, if the parties determined so by negotiation, as the law does not expressly prohibit this possibility (such as for the case of the trade union leaders)[11].

The duties incumbent upon the workers' representatives cover a wide range of activities. In principle, they should guard to the observance of the employees' rights, in accordance with the law in force, the applicable collective labor agreement, the individual

[8] In this regard see R. G. Cristescu, C. Cristescu, *op. cit.*, p. 326.
[9] In this respect, I.T. Ştefănescu, *op. cit.*, p. 109.
[10] For instance, the workers' representatives cannot defend the employees' rights, they represent in courts, jurisdictional bodies, other institutions or state authorities, through their own or elected counsels for the defense.
[11] The same, R. G. Cristescu, C. Cristescu, *op. cit.*, p. 327.

employment contracts and the internal regulation. In the absence of some trade union organizations in the unit, the workers' representatives have the following specific powers:

- to be consulted by the employer when reducing the working program from 5 to 4 days per week, with the appropriate reduction of the wage, according to Article 52 paragraph (3) Labor Code;
- to be consulted and informed by the employer that intend to make collective redundancy, as provided by Articles 69-70 Labor Code;
- to be consulted by the employer to the development of the annual vocational training plan, annexe to the collective labor agreement concluded at the unit level, according to Article 195 Labor Code;
- to approve the employees' requests of removal from work in order to attend the training programs;
- to organize, every semester, in the units information concerning the rights of the pregnant female employees, confinement after birth or who are breastfeeding, according to G.E.O. no. 96/2003 on maternity protection at work;
- to take part to the drafting of the internal regulation, with an advisory opinion, as provided by Article 241 Labor Code;
- to promote the interests of the employees regarding the wage, working conditions, working time and rest period, job stability and any other professional, economic and social interests connected to the employment relationships. According to Article 163 paragraph (2) Labor Code, the confidentiality of the wages may not be opposed by the employer against the representatives of the trade union;
- to notify the labor inspectorate as regards the breach of the legal provisions and the provisions of the applicable collective labor agreement;
- to support the solving, at workplace, of complaints made by the employees who consider themselves discriminated on the grounds of sex, according to Law no. 202/2002 on equal opportunities between women and men;
- to negotiate the collective labor agreement, according to Article 223 (e) Labor Code. This last task was added by Law no. 40/2011, amending the Labor Code, corroborating, thus, the provisions of the general act with the stipulations of the special law in matter (Law no. 62/2011 on social dialogue).

Currently, the measures of legal protection provided for the workers' representatives were substantially reduced. If the old regulations specifically stated that such persons cannot be dismissed for reasons related to the person of the employee, for professional unfitness or for reasons related to the mandate received from the employees, Article 226 Labor Code, republished, stipulates that the workers' representatives cannot be dismissed only for reasons of fulfilling the mandate that they have received from the employees. In conclusion, during the entire term of office, the workers' representatives may be dismissed based on all grounds provided by the Labor Code, including the ground of dissolution the job position or for professional unfitness. Such a dismissal is illegal only if it is proved that the real reasons that led to the dismissal had direct and immediate relation to the fulfillment of the mandate given by the employees[12].

Conclusions

The need of special protection for the workers' representatives was set out as a general principle in the European Social Charter and it was provided by the Romanian legislation in a number of special laws.

Thus, based on Article 28 of the Revised European Social Charter, the workers'

[12] In this respect, R. G. Cristescu, C. Cristescu, *op. cit.*, p. 330.

representatives are entitled to enjoy effective protection against the acts that could bring them prejudice, including the dismissal, and which could be based on their status or activities as workers' representatives within the unit; to benefit from specific facilities to enable them to carry out their functions promptly and efficiently, account being taken of the professional relations system of the country, as well as the needs, importance and capabilities of the concerned unit.

Internally, Article 8 of Law no. 467/2006 establishing the general framework for informing and consulting the employees, states consequently: the workers' representatives enjoy protection and guarantees to enable them to perform properly the duties entrusted to them for the entire term of the office. The setting and meeting of these obligations must, however, take place within the limits prescribed by law.

Also, based on Article 48 of Law 217/2005 on the establishment, organization and functioning of the European Works Council, the members of the special negotiating body of the European Works Council and the workers' representatives in Romania enjoy, in the exercise of their duties, the rights provided by the law in force for workers' representatives and the persons elected to the trade union bodies. These rights especially refer to the attending to meetings of the special negotiating bodies or of European Works Council or any other meetings required by law, as well as the wage payment for the staff members who are part of the Community-scale undertaking or Community-scale group of undertakings, during the necessary absence for the performance of their duties. The members of the special negotiating body may not be subject to any discrimination, cannot be dismissed or subjected to other sanctions, as a result of their duties, according to Law no. 217/2005. And not on the final turn, the members of the special negotiating body of the European Works Council and the workers' representatives must be given the time and necessary means to inform the employees on the progress and results of the information and consultation process.

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