THE PECUNIARY LIABILITY OF THE EMPLOYEE

Brîndușa Marian
PhD, UMFST Târgu Mureș

Abstract:In the present economic and social context, the pecuniary liability of the employee is an issue of great actuality. The legal nature, the conditions of the pecuniary liability, the situations in which the employee is pecuniary liable towards his employer are some of the issues we try to deal with in this research

Keywords: liability, employee, pecuniary, damages, labor.

Introduction

Legal liability becomes applicable in those situations where legal provisions that regulate the normal development of social life are violated by disturbing the exercise of one or more person's rights and interests. Legal liability stands as an important component of social liability and has a crucial component – the reparation aspect determined by an illicit act that determines damage[1].

Over the course of the employment contract it is possible for any of the parties to cause to the other party damage and therefore the obligation to repair this damage arises. In Romanian law, the pecuniary liability of the parties, employer and employee derives from the individual employment contract, regardless of the type of the employment contract, it has a reparatory nature and is founded on the principles of civil contractual liability without excluding a common law liability. Therefore, pecuniary liability in labor law represents a variety of civil contractual liability having certain particularities determined by the specifics of labor legal relations[2].

Pecuniary liability in labor law implies, consequently, obligations for both contractual parties. However, we consider that we are not in the presence of a symmetric legal regulation, for the liability of the employer towards its employee is more severe than vice versa[3].

Characteristics of pecuniary liability

Pecuniary liability is a contractual form of liability, having as a source the individual employment contract. The question of determining the persons between whom the problem of pecuniary liability can arise is of utmost importance. Employees, regardless of the type of employment contract, the persons that have an apprentice contract and those that are work-detached are subject to pecuniary liability. At the same time, the employer can also be held pecuniary liable[4]. In order for pecuniary liability to intervene guilt – as a condition of liability - has to exist and guilt, unlike in the case of civil contractual or tort liability, is presumed only

[1]Romulus Gidro, *Dreptul muncii, curs universitar*, Bucureşti, Editura Universul juridic, 2013, pp.280-290.
[2] Ion Traian Ştefănescu, *Tratat teoretic şi practic de drept al muncii*, Bucureşti, Editura Universul juridic,2010, p. 747
[3] Romulus Gidro, *op.cit.*, p. 281
[4] Alexandru Ţiclea, ,*Codul muncii comentat*, ed a II-a revăzută şi adăugită, Editura Universul juridic, 2011, p. 281.

by exception, in case of the administrator for quantity lacks in its administration[5]. In case of damages brought to the employer, pecuniary liability can have as object only damages of pecuniary nature, unlike in the case of pecuniary liability of the employer that covers both pecuniary and moral damages[6]. Pecuniary liability is an individual liability. Even if the labor Code refers in art. 255 to the situation when the damage was caused by several employees, we are still in the presence of a form of conjunct legal liability, still a personal liability that represents a multitude of individual liabilities of concurrent faults in the causation of a unique damage[7].

Pecuniary liability is an integral liability. According to the rules of civil contractual liability, the employee will be held liable only to the extent of the damages foreseen or foreseeable at the moment of the conclusion of the employment contract, the unpredictable damages being therefore excepted[8]. Amongst the cases of pecuniary disclaimer, in case of employees, the usual risks entailed by the nature of the labor performed are taken into consideration. Art. 254, paragr. (2) Labor Code. The compensation of the material damage caused by the employee is usually done by cash equivalent according to art. 257 labor Code and this implies deductions from the salary of the employee. There are, however, exceptions to this rule, in those cases when the employment contract is terminated before the employee compensates entirely the employer for the damages caused[9]. The determination of pecuniary liability is done either amicably either, in case of divergences, by the court of justice[10]. The actual procedure of recovering the damage is however no longer possible by issuing a deduction decision. This procedure is done either amicably or by intervention of the court[11]. The pecuniary liability, as far as enforcement is concerned, has a limited character. As a rule, a proportion of the salary can be subject to enforcement (maximum a third of the net income, without exceeding together with all other retentions that the subject in questions might have, half of the monthly income)[12]. It is forbidden to insert in the employment contract any stipulations that aggravate the pecuniary liability of the employer[13].

The pecuniary liability of the employee

If an employer has suffered a material damage by fault of the employee over the course of the individual employment contract art. 254, paragr.(1) of Labor Code states that the employee is pecuniary liable on the grounds of the principles of civil contractual liability for the damages caused to the employer by its fault or regarding his work. The pecuniary liability of the employer entails the cumulative presence of certain conditions: to have the employee quality; the illicit deed of the employee has to be in close connection to the performed labor; the existence of damage conditions liability;between the illicit deed and the damage has to exist a causality relation;employee guilt;

One of the conditions is to have the employee quality. The author of the act that produced the damage has to be in a contractual relation with the employer, regardless of the type of employment contract[14]. There are however certain out of the ordinary situations that require some clarifications. There are cases when, in order to recover the damage, the

[5] Romulus Gidro, *op.cit.*, p. 281.
[6]Marius- Cătălin Preduț, *Codul muncii comentat*, București, Editura Universul juridic, 2016, p. 600.
[7] Alexandru Țiclea, *op.cit*., p. 281.
[8]*Idem*.
[9] Romulus Gidro, *op.cit.*, p. 282.
[10] Alexandru Țiclea, *op.cit*., p. 281.
[11] Romulus Gidro, *op.cit.*, p. 282.
[12]Alexandru Țiclea, *Codul muncii comentat*, Ediția a 7-a, București, Editura Universul Juridic, 2015 p. 685.
[13] Romulus Gidro, *op.cit.*, p. 282.
[14]*Ibidem*, p. 283.

common legal regulations of civil liability are applicable. This is the case of those persons that perform some sort of labor paid by the hour, associated staff and paid polyclinic doctors[15]. Similarly, will be liable according to civil law regulations, the apprentices from professional schools and college students that carry out professional practice if they have not signed an employment contract, unlike the apprentices that have an apprentice contract at their work-place, those that are parties to a qualification contract or a professional adaptation contract – if they produced damage will be liable according to the provisions of pecuniary liability. Furthermore, we can mention the case of the employee that is a temporary work agent that produces damage to the user. In this case, the regulations regarding the pecuniary liability are not applicable and the only measure possible is an action in damages *ex contractus* (common law) against the temporary work agent that has, in its turn, the right to sue its employer[16]. Similarly, the detached employee will also be held pecuniary liable according to the rules of labor law. In this last case, if the detached employee has produced damage to the institution where he is detached at, compensation can be achieved by a civil action and both the detached employee and the unit that detached him can be respondents[17].

A characteristic of pecuniary liability stands in it being a responsibility for personal acts. There are situations where the damage is caused by more than one employee by a common deed that attracts a conjunct liability. In these cases, according to the contribution of each of the participants, the quantum of liability is established separately[18].

Although the labor Code does not expressly provide in this sense, we can state that there exists a subsidiary liability as a specific form of liability, that follows the main liability form. This type of pecuniary liability intervenes in cases such as: an employee through its personal illicit act has allowed another person to directly produce damage, not taking or taking tardily the necessary measures in order to replace the administrators or persons under its control, despite being warned in writing and motivated that the personnel does not fulfill its attribution in a satisfying manner; not taking the necessary measures to establish and repair the damages in administration; when a particular employee has determined by its illicit deed the payment of an amount of money that was not owed, the wrong handing-over of a good or provision of a service to another employee or a third person and the recovery of the damage is not possible from the latter. The case-law has shown that in those cases when the damage is caused by a criminal offence the author of the crime will be held mainly liable. However, if recovering the damage from the criminal offender is not possible the employee from whose negligence the illicit deed occurred will be held liable[19].

Another form, specific for pecuniary liability, is joint liability. Joint liability in the matter of pecuniary liability operates only exceptionally. It is of strict interpretation and cannot be used only in those cases when the legal provisions expressly provide in this sense. When the law provides for joint liability, the common law rules are applicable and in case the regression action is used against the guilty persons the proportion that each person has to cover from the damage is established according to the rules of joint liability.

Another condition is the illicit deed of the employee has to be in close connection to the performed labor. An important factor in establishing this is the job description. However,

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[15]Alexandru Ţiclea, *Tratat de dreptul muncii. Legislaţie. Doctrină, jurisprudenţă*, ed aVI-a revizuită şi adăugită, Bucureşti, Editura Universul juridic, 2012 p. 847.
[16]Ion Traian Ştefănescu, *Tratat teoretic şi practic de drept al muncii, ed-aII-a revăzută şi adăugită*, Bucureşti, Editura Universul juridic 2012, p. 778. Ion Traian Ștefănescu, *Codul muncii și legea dialogului social*, București, Editura Universul juridic, 2017 p. 453.
[17]Ion Traian Ştefănescu, Şerban Beligrădeanu, *Prezentare de ansamblu şi observaţii critice asupra noului Cod al muncii*, revista Dreptul nr.4/2003
[18] Romulus Gidro, *op.cit* p. 288.
[19]*Ibidem*, pp. 289-290

there is also the possibility to take into consideration certain attributions set by legal provisions and the regulations issued by the employer itself[20]. The illicit deed can be either an action or inaction; independently, it has to be personal, according to labor legal provisions that do not regulate liability for another person's illicit act. The employer has to prove to the court that the employee violated the fore set job tasks by wrongly carrying out or not carrying out at all his attributions, consequently leading to damage[21].

The existence of damage conditions liability is another condition of pecuniary liability. Damage is defined as a diminishing in one's patrimony as a consequence of an illicit deed. It has to be real and cert; produced by an employee; have a pecuniary nature. Accordingly, whether directly (when caused directly to the employer by an illicit deed) or indirectly (when the employee produces damage to a third person and the employer has to repair the damage), the employer has to suffer a pecuniary damage in course of fulfilling the job tasks or attribution in connection to the particular job in question[22].

The condition of causality relation between the illicit deed and the damage**.** There has to be a connection between the act and the damage, the latter has to be the consequence of the illicit act damaging in nature and produced by the employee in relation to his job. In each individual situation the causality relation has to be analyzed taking into consideration the circumstances in which the deed occurred, the means used to produce it and the nature of the damage[23].

Employee guilt is another condition.Pecuniary liability necessarily entails the existence of guilt of the author of the illicit deed that produced damage. It is of no importance the degree of guilt, liability being retained even for light negligence. The degree of guilt presents relevance only in those situations when the act has more than one author. In this case the individual liability of each author is determined according to their personal contribution to the damage[24]. Labor Code provides in art. 254, paragr. 2 cases when the employee is not pecuniary liable, such as: case of *force majeure* or fortuitous case, in state of necessity, in case of normal risks entailed by the job (the risk appears as a natural phenomenon either due to the use of production materials either as a consequence of work conditions or certain procedure that can have negative consequences on the employers' patrimony[25] and in case of carrying out an order given by a superior.

The obligation to return

According to provisions of art. 256, paragr. 1 and 2, the employee that has to cash-in from his employer an amount of money that is not owned, is obliged to return the amount. If the employee has wrongly received goods that cannot be returned in nature or has been wrongly provided with certain services, it is obliged to return their value in money. The obligation to return has in its scope two situations as far as the liability of the employee is concerned. If the employee is not guilty, in the above mentioned situations pecuniary liability does not operate; however, if the beneficiary of the payments that were not owed, the wrongly received goods or services is dishonest he will be held liable not only for the obligation to return the money, goods, services but in such cases the rules of pecuniary liability and civil tort liability are applicable. The employee guilty for the payment not owed,

[20]Costel Gâlcă, *Comentariu* în RDS no. 6/2011; Costel Gâlcă, *Codul muncii comentat şi adnotat, editura Rossetti International*, 2015, Ion Traian Ştefănescu, *op.cit.*, 2012, p. 780.
[21] Romulus Gidro, *op.cit*, p. 284.
[22]*Ibidem*, p. 285., Ion Traian Ştefănescu, *op.cit.*, 2010, p. 750.
[23] Romulus Gidro, *op.cit.*, p. 285.
[24]Nicolae Roș, *Dreptul muncii: curs universitar*, București, Editura Prouniversitaria, 2017, p. 357.
[25] Romulus Gidro, *op.cit* p. 286.

the wrong provision of services or delivery of undue goods has a subsidiary liability if the damage cannot the totally or partially repaired by the beneficiary.

The procedure for establishing the pecuniary liability

According to the provisions of labor Code as republished, the means of establishing and recovering the damage caused to the employer are: amicably and through court intervention.

As far as the amicable procedure of recovering the damage is concerned, this has to be recorded in writing even if the law does not expressly provide for the written form. The legal provisions in force at present, impose on the employer that chooses this amicable recovery procedure, the obligation of drawing-up a finding-note that will be communicated to the employee. In this case, it is our belief that this procedure cannot be fulfilled except in writing. The choice of this amicable procedure for recovering damage is optional and can be initiated only by the employer, for only he can draw-up the documents involved[26]. The period for recovering the damage cannot be less than 30 days from the moment of communication. The value of the recovered damage through the agreement of the parties, cannot exceed the equivalent of 5 minimum gross wages on economy. If the damage was produced by more than one employee the employer can either sign a recovery agreement with each of the authors or only with one or some of them, following that these will later have the possibility of a suit. If the contribution of each of the participants to the creation of the damage cannot be determined, the individual responsibility for every author is determined proportionally to its net income, from the establishment of the damage or, when the case, the period of time that he worked from his last inventory. The employee can decline signing such an agreement either because he considers himself not guilty or he considers the value of damage as established by the employee not to be correct. If the parties do not reach an agreement the only way left is the intervention of the court.

The intervention of the courttakes place when the recovery of damage cannot be accomplished according to art. 254, paragr. 3. The referral of the case to the court has to be done in a period of maximum 3 years that start, depending on the situation, from the moment the right to sue appears[27] (). If the recovery of the damage is not done by the agreement of the parties, the withholding owed as damages caused to the employer cannot be made unless the debt owed by the employee is due, liquid and payable and has be accordingly ascertained by a definitive and irrevocable court judgment. The civil procedure Code establishes the enforceable nature of judgments[28].

In labor law the employee benefits of a special protection regime and consequently the amount established for covering the damages can be withhold only in monthly installments from the salary rights of the person in question owed from the employer. These installments cannot exceed a third of the net monthly salary and, together will all other withholdings, a half of the salary. In establishing the quantum of the installments the basic salary, indemnities and all other benefits have to be taken into consideration.

If the employment contract is terminated before the employee has fully indemnified the employer and the author of the damage is hired to a different employer or becomes a public servant, the salary withholdings will be carried on by the new employer or new institution or public authority on the bases of the enforceable title communicated to this end by the indemnified employer. In those cases when the employee in debt does not start

[26]Ion Traian Ștefănescu, Șerban Beligrădeanu, *art.cit.*, p.146.
[27]According to art. 268 letter c) in case of pecuniary liability of the employee towards the employer
[28]Iona Traian Ștefănescu, 2010, p. 751.

employment relations with a new employer, the recovery of the damage is done by pursuing his goods, in the conditions set by the civil procedure Code.

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