Decision no. 730 of 2 November 2021

regarding the exception of unconstitutionality of the provisions of Article 111, of Article 120, of Article 121, of Article 122 (1), of Article 123 and of Article 229 (4) of Law no. 53/2003 – The Labor Code, as well as Article 142 (2) of the Social Dialogue Law no. 62/2011, in the interpretation given by Decision no. 17 of 13 June 2016, pronounced by the High Court of Cassation and Justice - The Panel for resolving certain matters of law

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Summary

I. As grounds for the exception of unconstitutionality, its authors, referring to the provisions of Article 111, Article 120, Article 121, Article 122 (1), Article 123 and Article 229 (4) of Law no. 53/2003 – Labor Code, claimed the lack of clarity and predictability of the regulation, namely the fact that the courts are not uniform in the interpretation of the notions of "work" and "additional work". Specifically, the authors of the exception are interested in how the period of time they were on stand-by, at the employer's disposal, in a special space arranged for rest, is qualified.

Regarding the provisions of Article 142 (2) of the Social Dialogue Law no. 62/2011, the authors of the exception showed that they are unconstitutional to the extent that the nullity of the clauses of collective labor agreements, being considered a private nullity, cannot be invoked ex officio by the court. Thus, the provisions of Article 41 of the Constitution being violated, in the context where the clauses of the agreement refer to the aspects provided by this constitutional text, as it is obvious that a legal provision of general interest is being violated.

The authors of the exception also argued that the unconstitutionality of the provisions of Article 142 (1) and (2) of Law no. 62/2011 is applicable also by reference to Article 16 of the Constitution. The provisions of Article 138 (4) of Law no. 62/2011 were taken into account, whereby the clauses contained in the collective labor agreements regarding salary rights in the budgetary sector concluded with the provisions (1) – (3) of the same article are struck by absolute nullity. As long as the clauses contained in the collective labor agreements in the government sector are struck by absolute nullity, and those in the private sector are struck by relative nullity, the principle of equal rights enshrined in Article 16 of the Constitution is violated.

II. Examining the exception of unconstitutionality of the provisions of Article 111, Article 120, Article 121, Article 122 (1), Article 123 and Article 229 (4) of Law no. 53/2003 - Labor Code, in relation to the criticisms made, the Court recalled that, as has consistently ruled in its jurisprudence, any normative act must meet certain qualitative conditions, among which is predictability, which implies that it must be clear and precise enough to be applied. Taking into account the rulings in its jurisprudence, the Court, analyzing the criticized provisions, held that Article 111 defines "working time" as any period during which the employee performs work, is at the disposal of the employer and fulfills his tasks and duties, according to the provisions of the contract

individual work, of the applicable collective labor agreement and/or of the legislation in force. Also, the Constitutional Court specified that it has already been established by the Court of Justice of the European Union (CJEU), in its case-law, that Directive 2003/88 on the organization of working time defines working time as any period in which the employee is at work, at the disposal of the employer and exercising his activity or functions, in accordance with national laws and/or practices, and that this notion must be understood in opposition to the notion of a rest period, these being mutually exclusive. In this context, Directive 2003/88 does not provide an intermediate category between working and rest periods, and the characteristic elements of the notion of "working time" in the sense of this directive do not include the intensity of the work performed by the employee or his yield. According to the CJEU, the qualification as "working time", within the meaning of the mentioned directive, of a period of the worker's presence depends on the latter's obligation to be at the disposal of his employer. The determining factor is the fact that the worker is obliged to be physically present at the place determined by the employer and to remain at his disposal in order to be able to perform the appropriate services immediately, in case of need. Thus, the obligations that make the worker in question unable to choose his place of residence during periods of professional inactivity represent a form of exercise of his duties. In its case-law, the CJEU held that Directive 93/104/EC on certain aspects of the organization of working time, as amended by Directive 2000/34/EC, as well as Directive 2003/88 must be interpreted in the sense that they oppose the legislation of a member state under which the services performed by an on-duty doctor according to the regime in which his physical presence at the workplace is required, but in the course of which he does not carry out any actual activity are not considered to represent "working time" entirely, in the sense of the respective directives. At the same time, it stated that the mentioned directives do not oppose the application by a member state of a legislation which, with the purpose of paying the worker and with regard to the on-duty service performed by him at the workplace, takes into account differently the periods during which the work duties are actually performed and those during which no actual work is performed, to the extent that such a regime fully ensures the beneficial effect of the rights conferred on workers by the above-mentioned directives, with a view to the effective protection of their health and safety.

With regard to the applicability of the provisions of the CJEU case-law on the interpretation of Articles 112, 120 and 123 of the Labor Code, the findings of the High Court of Cassation and Justice (HCCJ) in its case-law are relevant, whereby, since Directive 2003/88 /CE was transposed into domestic law, the national courts have the obligation to interpret the national law that transposes the directive in question (Law no. 53/2003 - Labor Code), through the lens of the text and the purpose of that act. Once the case-law of the CJEU is clear regarding the legal issue brought before judgment, it follows that there are no difficulties of interpretation and application for the factual situation that the national court was called to resolve, the latter having the obligation to verify the incidence of the given exemptions by the European court, regarding the qualification of this period as "working time" and the payment of the worker in such a situation.

Thus, the Court assessed that both the parties to the employment relationship and the courts had at their disposal sufficient elements to establish, unequivocally, the

meaning of the legal texts subject to constitutionality review and to foresee the consequences of the application of these legal norms, so that the claims the authors of the exception regarding their unconstitutionality were considered to be groundless.

Regarding the exception of unconstitutionality of the provisions of Article 142 (2) of Law no. 62/2011, the Court held that its authors criticized the mentioned article of law from the perspective of the hypothesis under which they claim to be, namely that of Article 132 of the same normative act. Thus, they had in mind one of the provisions of the collective labor agreement, the content of which they considered to be against the legal provisions that define working time.

The legislator, through Article 132 of Law no. 62/2011, establishes the obligation to observe, on the occasion of concluding collective labor agreements or individual labor agreements, the minimum level of employee rights established by collective labor contracts concluded at a higher level. The penalty for not complying with these imperative provisions is, according to the provisions of Article 142 (1) of Law no. 62/2011, the nullity of the collective labor agreement clauses contrary to the provisions of Article 132. The previously mentioned regulation is obviously aimed at the protection of the rights of employees, sanctioning with absolute nullity any clause that would aim at diminishing their rights below the limits established by law. This solution, a true reflection of the constitutional provisions of Article 41 which enshrines the right to work and social security measures for employees, takes into account the fact that employment relationships are not characterized, like other legal relationships under civil law, by a position of equality of the parties, but through a subordination of the employee to the employer. Therefore, he must benefit from effective legal guarantees against any abusive attitudes of the employer that would tend to obtain work under conditions less favorable to the employee than those established by law. The legislator extended these guarantees also in the case of collective labor agreements, even if the unequal position of the parties is mitigated during collective bargaining. The Court appreciated that the legal provisions, which require compliance with the minimum level of employee rights established by law and by collective labor agreements concluded at a higher level, reveal the minimum level of protection that employees must enjoy in the conduct of employment relationships considered to meet the requirements constitutional provisions regarding the right to work and the social security of employees, and the penalty for violating these provisions can only be the absolute nullity of the clauses thus established.

The authors of the exception considered that an effective protection of the rights enshrined in Article 41 of the Constitution can only be obtained to the extent that the nullity of the clauses of the collective labor agreement that are contrary to the provisions of Article 132 of Law no. 62/2011 can be invoked not only by the interested parties, as stipulated in Article 142 (2) of Law no. 62/2011, but also by the court, *ex officio*. Under this aspect, they considered themselves discriminated in relation to the persons who fall under the hypothesis of Article 138 of Law no. 62/2011, in the case of which the nullity of collective labor agreements can also be invoked by the court, *ex officio*.

The High Court of Cassation and Justice (HCCJ) interpreted, by Decision no. 17 of 13 June 2016, the provisions of Article 138 (3) - (5) and Article 142 (2) of Law no. 62/2011 and decided that the nullity of a clause of the collective labor agreement negotiated in violation of Article 138 (1) - (3) of Law no. 62/2011 can be requested by

the interested parties, either by way of action or by way of exception, and it can be invoked by the court, *ex officio*, during the existence of the collective labor agreement. In justifying the mentioned decision, the supreme court showed that the provisions of Article 132 (2) - (4) of Law no. 62/2011 provide rights in favor of employees, they protect a private interest, so the sanction for non-compliance with them is the relative nullity. In contrast to this situation, the sanction imposed in case of non-compliance with the prohibition to negotiate rights not provided by the state budget law [Article 138 (1) - (3)], which protects a public interest, must be qualified as an absolute nullity. Such an interpretation was also justified by the fact that the legislator expressly included the reference to the penalty of absolute nullity in the content of Article 138 and was not limited to the mention in Article 142 which regulates, as a matter of principle, the nullity of clauses negotiated in violation of Article 132.

The Constitutional Court restated that the provisions of Article 132 of Law no. 62/2011 reveal the minimum level of protection that employees must enjoy in the conduct of labor relationships considered to meet the constitutional requirements regarding the right to work and the social security of employees. Therefore, to say that the sanction against the clauses of a collective labor agreement concluded in violation of Article 132 of Law no. 62/2011 is the relative nullity, starting from the simple difference between the employees in the private sector and those in the government sector through the lens of the sources of financing of their revenues, amounts to a denial of the special significance that this norm has through the provisions of the Fundamental Law and, consequently, to a violation of the provisions of Article 41 of the Constitution. Such an interpretation, by qualifying as relative nullity the sanction of the clauses of the collective labor agreement concluded in violation of Article 132 of Law no. 62/2011 and by applying, as a consequence, a different legal treatment than that established in the case of nullity provided by Article 138 (4) of the same law is therefore unconstitutional. Moreover, the Constitutional Court found that, from the manner in which the legislator regulated the provisions of Article 142 (2) of Law no. 62/2011, it is clear that it did not seek to establish a different legal treatment concerning the regime of nullity between the hypotheses regulated by the provisions of Article 132 of Law no. 62/2011 in relation to those provided in Article 138 of the same law. Thus, since, as correctly held by the HCCJ by Decision no. 17 of 13 June 2016, the violation of the provisions of Article 138 of Law no. 62/2011 entails the absolute nullity of the clauses of collective labor contracts, the same conclusion must be retained also with regard to the hypothesis of violation of the provisions of Article 132 of the same law. The fact that the provisions of Article 138 (4) of Law no. 62/2011 expressly provide that clauses contained in collective labor agreements concluded in violation of provisions (1)-(3) of the same article "are null and void" constitutes a sufficient argument to consider that the violation of the provisions of Article 132 of Law no. 62/2011 is sanctioned with relative nullity, given that Article 142 (1) of the same law contains a similar provision, according to which the clauses contained in the collective labor agreements that are negotiated in violation of the provisions of Article 132 are null and void.

Therefore, the Constitutional Court held that the provisions of Article 142 (2) of the Social Dialogue Law no. 62/2011, in the interpretation given by the High Court of Cassation and Justice, impermissibly restrict the scope of the sanction of absolute nullity, being unconstitutional by the fact that they exclude the hypothesis of Article 132

from Law no. 62/2011 from the application of the same legal regime that the supreme court established regarding Article 138 (1)-(3) from Law no. 62/2011.

III. For all these reasons, unanimously, the Court rejected as unfounded, the exception of unconstitutionality and found that the provisions of Article 111, Article 120, Article 121, Article 122 (1), Article 123 and Article 229 (4) of the Law no. 53/2003 – Labor Code are constitutional in relation to the criticisms formulated.

Also unanimously, the Court admitted the exception of unconstitutionality and found that the provisions of Article 142 (2) of the Social Dialogue Law no. 62/2011, in the interpretation given by Decision no. 17 of 13 June 2016, pronounced by the High Court of Cassation and Justice – the panel for resolving certain matters of law, are unconstitutional.