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THE ADMISSIBILITY OF THE TORTIOUS LIABILITY ACTION REGARDING THE EMPLOYMENT RELATIONSHIP

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Abstract: *Tort liability is one of the important legal institutions in civil law seeking compensation for damage, and in certain circumstances, we also find it in employment relationships as a form distinct from patrimonial liability, the objective of which is also compensation for damage. Given the onerous nature of the employment relationship, in the cases that we will analyze about the admissibility of tort liability, we start from the same rights and obligations of the parties in the sense that the damage caused by the employee or the employer is due a failure in fulfilling the obligations in the employment relationship. Although the patrimonial liability as regulated by Art. 254 of the Labor Code is a special responsibility of the employment relationship, the text of the law does not qualify this type of liability as exclusive in the case of the employment relationship, which is why the case-laws identify situations where tort liability is also generated in the context of such employment relationships.*

Keywords*: prejudice, tort liability, admissibility, patrimonial liability.*

1. Introduction

Civil liability is intended to compensate for damage (Pop L., 1998, p.164), respectively to restore the patrimony of the injured person in the situation in which he would have found himself if the wrongful act had not occurred so that the person liable must remove all the harmful consequences of his deed. From this perspective, the approach of civil liability as a means of defending and restoring the affected subjective rights and interests of all natural and legal persons (Bârsan, Stătescu, 1998, p.124) is made from the perspective of the victim to whom the affected social balance must be restored.

Being disturbed the social balance through the wrongful act, by engaging civil liability, it is desired both to defend the interests of the victim, through full compensation and to defend the interests of the entire society to which the victim and the perpetrator belong, aiming that by sanctioning the latter to impart education in the sense of becoming aware of the social meanings of the act causing damage and of preventing the incidence of new harmful illicit deeds (Mangu, F.I., 2013).

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Referring to the French legislation and doctrine, we will find the same defining landmarks: "*The characteristic of civil liability is to restore, as accurately as possible, the balance disturbed by the damage caused and to restore the injured person, at the expense of the person responsible, in the situation in which he would have been found, if the act that caused the damage had not occurred* " (Savatier, 1951 *apud* le Tourneau, 2006, p.367). The essence of civil tort liability consists in the existence of prejudice, caused by the violation of subjective rights or legitimate interests of a person, objective conditions, without which, however, an obligation to repair cannot be established (Neculescu, I., 2011).

Moreover, in the regulation of Art. 254 of the Labor Code of patrimonial liability, the tort liability is not excluded and the patrimonial liability is not regulated as being an exclusive one in the case of employment relations, which is why in the case of disputes where the applicant establishes the procedural framework by framing his claims on the provisions of the tort liability of the Civil Code, the court respecting the principle of availability must analyze the admissibility of the action in the perspective of the principle of the availability of the parties (www.euroavocatura.ro/jurisprudenta on the sentence of the Tg.Mures Court no.311/31.01.2018).

2. **Patrimonial liability vs. tortious liability in employment relationships**

Having as a reference the text of art.254 para. (1) of the Labor Code, patrimonial liability is defined as that obligation incumbent on the employee, based on the rules applicable to contractual liability – individual labor contract, for material damages produced to the employer due to his culpability or fault in connection with the work performed.

From the logical-grammatical interpretation of these legal norms, by the jurisprudence and the doctrine (Țiclea, 2016, p.914) it results that to entail the patrimonial liability of the employee towards the employer, several requirements must be met cumulatively, similar to the requirements of the tort liability:

- there is an unlawful act of the employee, the wrongdoing being related to the contractual employment obligations or to the tasks in the job description, that are not respected by the employee.
- the act must have been committed with guilt, even in the form of the simplest fault; given the written nature of the employment contract and the job description, the employee may not invoke the ignorance or unpredictability of the tasks or the obligations of the service; at the same time, guilt is a subjective element of responsibility, consisting in the mental attitude of the person towards his deed and the harmful consequences, so that the employee cannot invoke a lack of discernment at the time of committing the harmful act.
- there is material damage suffered by the employer, the basis for liability; the existence of injury presupposes actual material damage and not future injury; having regard to this condition, although it is a contract in which clauses negotiated by the parties may also be included, stipulating a penalty clause in an individual employment contract or an addendum is prohibited because possible material damage cannot be assessed in advance and negotiated (HCCJ Decision no. 19/2019).
- there is a causal link between the act and the damage.

Similar to tort liability, the absence of any one of the above conditions makes it impossible for the employer to require that the employee be held patrimonially liable.

On the other hand, in the absence of the quality of an employee (for example, the non-conclusion of the employment contract in a valid form or even the existence of a cause of nullity of the employment contract and the carrying out of the activity under the presumption of the existence of the employment contract) at the time of the occurrence of the damage will not make it possible to incur a patrimonial liability towards the alleged employer, but the compensation of the damage will be made according to the mechanisms of the tort liability if the cumulative conditions of tort liability are proved to have been met.

The obligation to prove that all the conditions for incurring patrimonial liability are met lies with the employer by the provisions of art. 272 of the Labor Code, according to which: *"The burden of proof in labor conflicts lies with the employer, who is obliged to submit the evidence in his defense by the first day of appearance"*.

Although in the case of patrimonial liability, we are in the realm of contractual liability (art.1350 of the Civil Code) where the creditor of the unfulfilled obligation must prove the existence of the contract and the non-fulfillment of the obligation, the fault of the debtor of the unfulfilled obligation being presumed on this evidence, in the case of patrimonial liability as we have previously found proof of the existence of guilt is a mandatory condition and cumulative, as in the case of tortious civil liability.

Moreover, the employer must address the court to verify the fulfillment of the conditions and the engagement of patrimonial liability, even if the nature of the employment relationship is one of hierarchical relationship and the employer has some prerogatives over his employee, similar to the relationship between the servant and the principal.

The effect of the cumulative conditions for the engagement of patrimonial liability is also supported in the jurisprudence (*Bucharest Court of Appeal, Section VII for cases concerning labor conflicts and social insurance, Civil Decision no. 692/2018 of 15.02.2018, not published* – www.juridice.ro), the court being the one which *apriori* to the substance of the case must first verify that the conditions are cumulatively met. Although in that case (www.juridice.ro) the appellate court also analyzed and applied the principles of civil procedure (ordinary labor law), the respective appeal was rejected and upheld the judgment of the court of first instance because, before the court of appeal, no new grounds of the introductive court action can be invoked before the court of appeal, by new means of defense or evidence, the issue of employee liability is of interest from the perspective of the article.

Thus, the court of first instance correctly dismissed the employer's action before the court, which proved his contravention penalty for wrongful acts committed by failing to comply with his obligations, as the operator within the Electronic System of Public Procurement (SEAP) in the period 30.08.2011 – 24.02.2012. Company addressed the court for the patrimonial liability of his employee who in fact and in law did not have access to The Electronic Purchasing System did not have this attribution in the job description, but only prepared the necessary information to be posted on SEAP.

Quite rightly, the court of first instance, concise by its findings, that the applicant- the employing company only asserted the guilt of its employee in relation to damage suffered, and did not prove acts of breach of obligations deriving from the employment contract by rallying to the service tasks of the defendant-employee.

In that case, the employee-defendant proved by the evidence administered (documents – job description and witnesses) that the employer did not have a clear and precise procedure regarding the requirements of the advertising of the procurement procedures, being a fractional activity, the IT staff having the proper rights to access the SEAP platform and the publication of the materials prepared by to the staff of the Purchasing Office (where the defendant-employee was employed). In view of this fractional system of advertising in SEAP, the court of first instance rightly held that the defendant-employee had no direct access to SEAP or service obligations on advertising in SEAP but only on the preparation of materials related to procurement procedures.

With regard to the mentioned case, we believe that the court would have given the claimant company a win if it had based its action on the criminal liability provisions of the civil code requesting the joint liability of both the IT staff and the one from the Procurement Office, both knowing the legislation specific to public procurement and the need for publicity through the prism of the objectives of the circumstantial tasks of public procurement procedures.

Similar to patrimonial liability from labor law, from the perspective of administrative law, the definition of patrimonial liability (titled by the Administrative Code, civil liability by prorating to the nearest gender) is provided by art. 499 of the Administrative Code (former art. 84 of Law no. 188/ 1999 regarding the Statute of civil servants). Thus, the legislator, similar to the principles of patrimonial liability, provides that patrimonial liability represents "that civil liability that belongs to the civil servant for the damages caused by fault in the patrimony of the public authority or institution in which he operates, for the non-return within the legal term of the sums granted to him unjustifiably or for the damages paid by the public authority or institution, as principal, to third parties, based on a final court decision. From the definition of Art. 499 of the Administrative Code we find elements of civil liability in tort (perhaps, for this reason, the reference of the legislator as being a civil liability), although the service relationship of the civil servant is a species of work rapport, a relationship from which, however, the contractual elemental – individual employment contract is missing.

The patrimonial liability of the public servant is similar to the civil tort liability, with the only difference that the damage produced by the wrongful act is directed either against the patrimony of the public authority or institution to which the guilty public servant belongs or against a natural or legal person of private or public law.

Unlike the patrimonial liability in administrative law where the wrongful act can be directed by the administrative act and against a natural or legal person of private or public law, such a condition is not required in labor law, although it is possible that the illegal act of the employee, to cause prejudices to third parties with whom he comes into contact in the development of employment relations. In this case, the employer may be held liable, its legal liability being similar to the civil liability of the principal for the deed of the servant, following that, in turn, the employer, after covering the damage suffered by third parties, to address with an action based on the patrimonial liability regulated by art.254 of the Labor Code, against the employee - his servant.

3. Analysis of the admissibility of tort liability in the case of terminated labor contracts

Taking into account the general limitation period of 3 years in the case of tort and patrimonial liability, in the case of damages caused to the employer due to the fault of the employee who is in the defective fulfillment of the service workers, the compensation of the damage after the termination of the employment contract is made exclusively in the realm of tort liability. Thus, although at the time of the occurrence of the damage, there was the status of the employee, a mandatory condition of patrimonial liability, at the time of requesting the commitment of liability for compensation for the damage, the absence of this quality will determine the necessity of classifying the liability on a tort-type one.

The jurisprudence also supports this solution (www.euroavocatura.ro - Sentence no.311 / 31.01.2018 Târgu Mureș Court), although in the case that we will present the court of appeal dismissed the action for liability tort, considering that the procedure of labor disputes should be followed for the commitment of patrimonial liability. In the mentioned case, the company suffered damage of 21,491 lei through the wrongful act of the former employee-economist who stole different amounts of money during the employment relationship, without filing a criminal complaint against the former employee whose employment relationship was terminated by the disciplinary termination of the employment contract, following the recovery of the damage was addressed to the court with an action for tortious liability on the provisions of Art.1357 para.1 of the Civil Code.

The court of first instance and the court of appeal (by the decision of which the decision of the court of first instance was ultimately upheld) respecting the principle of the availability of the parties, in particular the right of the plaintiff to establish the framework procedurally, they correctly and thoroughly admitted the action for tortious liability (respectively they accommodated the sentence on appeal, maintaining the solution of the court of first instance) of the former employee for the compensation of the damage caused to the former employer by the dereliction of his deeds circumscribed to the employment duties existing at the time of committing the acts of embezzlement.

4. Conclusions

From the point of view of the characteristics of patrimonial liability, the liability for damage compensation, either of a contractual nature (based on the individual employment contract), or of a tortious nature (based on the service report and the administrative decision of appointment), is personal and individual, establishing, as a rule, the responsibility of a single employee guilty of causing the damage through his own act, in relation to the specific service obligations (job description).

The patrimonial liability, specific to labor law, and the administrative patrimonial liability do not contain rules derogating from the principle of solidarity of liability engagement, a principle included in the civil law of patrimonial liability. As an exception, in labor law and in administrative law, if the damage is caused jointly by several employees or by several civil servants, the obligation to repair the damage is joint,

sometimes subsidiary and at the same time joint, but not joint . So, in this case, the employer or the institution or the public authority does not benefit from civil law solidarity, as a guarantee of the possibility of recovering the damage, each of the guilty parties being held responsible to the extent that they participated in causing the damage through their own act.

As in labor law, administrative law provides for the joint and several liability of the public authority and the civil servant or contractual staff for damages caused by typical or similar administrative acts. The framework law that constitutes the seat of the matter for this liability is Law no. 554/2004 on administrative litigation, and one of the examples of joint and several liability is the one contained in art. 16, which refers to the situation in which compensation is requested for the illegal act of the person "who contributed to the elaboration, issuance, adoption or conclusion of the act or, as the case may be, who is guilty of refusing to resolve the request related to a subjective right or a legitimate interest".

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