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ABUSE OF RIGHT IN LABOUR RELATIONS

SPECIALITY 553.05. LABOUR LAW AND SOCIALL PROTECTION

Summary of the thesis in law

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CONCEPTUAL LANDMARKS OF THE RESEARCH

Topic relevance. The abuse of right is widely acknowledged across most legal systems as a malicious form of exercise of a subjective right It is the most representative expression of violation of a core legal principle, specifically the principle of good faith that governs the behavior of parties involved in a legal relationship. This principle, essentially a legal concept infused with significant moral value, delineates the boundaries within which the exercise of a subjective right should align with the societal purpose for which it was established. Article 13 of the Civil Code of the Republic of Moldova expressly prohibits the exercise of any right with the intent to harm another person's interest. The article imposes an obligation on the courts to deny protection to individuals engaging in the abusive exercise of subjective rights and, if necessary, mandate the cessation of such abusive practices based on the nature and consequences of the abuse of right.

At the same time, it is observed that labor legislation lacks explicit rules that delineate the "red lines" defining the permissible boundaries within which participants in legal labor relations should exercise their rights. The conduct of participants in legal employment relationships is guided by a set of fundamental principles governing employment regulation and related matters, as outlined in Article 5 of the Labor Code of the Republic of Moldova. Unfortunately, these principles do not comprehensively restrict the conduct of the parties in legal employment relationships to the realm of good faith, nor do they establish prohibitions against the abusive exercise of rights by the involved parties. In summarizing these principles, it is obvious that, on one hand, the parties bear the obligation to adhere to the rules originating from labor legislation, and on the other hand, they have the right to claim the fulfillment of their respective obligations. The normative content of labor law conspicuously lacks specific boundaries that would delineate the legitimate scope within which parties can exercise their rights and assert claims to corresponding obligations.

The occurrence of situations where parties in legal employment relationships abuse their rights serves as a pertinent and contemporary rationale for initiating discussions on the establishment of the principle of good faith as a governing principle for legal employment relationships. Additionally, delineating the boundaries for the exercise of rights by parties in legal employment relationships becomes crucial in mitigating situations where one party acts with the intent to harm the other, within the context of exercising their rights. This initiative is anticipated to contribute significantly to the reduction of such situations and foster a more equitable environment in legal employment relationships.

The arguments presented above underscore the urgent need for a comprehensive study on the matter of abuse of right in legal labor relations.

The exercise of subjective rights is expected to be conducted by their holders with due regard for the rights of others and without causing harm to the interests of third parties. Across most European countries, the exercise of rights within employment relationships is framed by consideration for the rights and interests of all participants involved, aligning with the economic and social purposes for which these rights were established. Within this framework, good faith is acknowledged by legislators as a fundamental principle intended to guide the conduct of parties in legal employment relationships, ensuring that any overstepping of rights beyond prescribed limits carries legal consequences. The norms enshrined in the laws and codes regulating labor relations and those related to them in European countries, viewed through the lens of the theory of relativity of absolute rights, are designed to curb the abusive exercise of these rights. This limitation extends to the exercise of labor rights by employees, employers, and their representatives throughout the entirety of the legal employment relationship, whether collective or individual in nature.

Current state in the field of research. To discern the position of the institution of the abuse of right within legal labor relations, we conducted an extensive study of doctrinal sources both domestically and internationally. Notably, the local legal doctrine has not extensively explored this subject, except for Mr. Eugen Bejenaru's monograph published in 2013, who analyzes this contradictory concept in the framework of his bachelor's degree thesis, later publishing his findings. While a few other authors touch on this topic tangentially, a distinct void exists in its specific examination within the context of labor relations. This gap is only briefly addressed by some authors. However, the initiation of this study was inspired by the works of doctrinaires from the Republic of Moldova, outlined as follows: S. Baiesu. N. Sadovei, E. Boisteanu, N. Rosca, Gh. Avornic, D. Baltag, B. Negru, A. Negru, N. Romandas etc.

In Romanian specialized literature, the subject was addressed by authors such as: I. Deleanu, D. Gherasim, Ș. Belgradeanu, Al. Țiclea, I. Tr. Ștefănescu, O. Ungureanu, Gh. Beleiu, Al. Athansiu, V. Pribac, S. Neculăescu, V. Stoica, R. Dimitriu, Gh. Mihai et al.

We also acknowledge the contributions of various international doctrinaires, including L. Josserand, A. Supiot, W. Blackstone, H. Capitant, R. Savatier, and others, who have provided fundamental insights into the subject of the abuse of right.

Integral to our research is the exploration of the related legal frameworks. Our study predominantly focuses on the regulation of the abuse of right within national legislation, particularly examining the placement of this institution in the Civil Code of the Republic of Moldova. Furthermore, our analysis extends to the legal landscapes of European Union member

states such as Romania, Germany, France, Lithuania, and others. Additionally, we delve into the legal frameworks of the United Kingdom of Great Britain and Northern Ireland, Ukraine, the Russian Federation, and more, recognizing their significance in providing a comprehensive understanding of the subject matter.

The purpose of the research is to carry out a comprehensive exploration of both theoretical and practical dimensions surrounding the abuse of right within legal employment relationships. This involves identifying situations of the abusive exercise of rights by the subjects of labor relations and discerning the underlying factors that lead to the abuse of right within these relations. Equally pertinent to the study is the justification for recognizing good faith as a fundamental principle of labor law, advocating for its inclusion in labor legislation. Moreover, the research endeavors to propose legislative amendments (*ferenda law proposals*) aimed at fortifying the regulatory framework and designed to provide a more robust structure for monitoring the conduct of parties within the bounds of normal subjective law exercise, thereby mitigating potential adverse consequences stemming from illicit or bad faith behavior in legal employment relationships.

To achieve the stated purpose, the study outlines the following **objectives**:

1. Presenting the fundamental principles and theses, which contributed to the development of the abuse of right theory;
2. Highlighting the legal nature of the abuse of right, through the lens of comparative research approach to explore other forms of malicious legal practices (such as illegal acts, fraud against the law, contractual opportunism, etc.);
3. Formulating a definition of the notion of abuse of right within legal employment relationships, emphasizing the principles guiding the exercise of subjective rights;
4. Identifying the rights within the legal employment relationship that are not susceptible to abuse;
5. Justifying the need for sanctioning the abuse of right, including through the lens of the legal consecration of the principle of good faith as a guiding principle of labor law;
6. Formulating *ferenda law proposals* to minimize the impact on social relations governing the employment relationship resulting from the abusive exercise of rights by the subjects involved in this relationship.

The scientific novelty of the obtained results lies in the pioneering nature of this research within the local doctrine, representing the first comprehensive and systematic examination of the prevalence of the abuse of right within the framework of labor relations. The innovative aspect is amplified by labor law's suitability for observing the applicability of Articles 10, 11, and 13 of the Civil Code of the Republic of Moldova. Notably, this study delves into the historical perspective of the origin and evolution of the abuse of right concept, exploring the theories that identified this phenomenon, scrutinizing the factors contributing to its emergence, examining its various manifestations within the context of legal labor relations, and delineating the boundaries for the exercise of subjective rights by participants in labor relations. Throughout the study, we have elucidated situations wherein participants in the employment relationship exercise their rights and freedoms in contravention of the principle of good faith, disregarding the rights of others and acting without a legitimate interest. Notably, the Labor Code of the Republic of Moldova does not explicitly address the impermissibility of rights abuse within employment relationships, posing a substantial threat to the stability and longevity of these relationships. When one party abuses a right, it jeopardizes the honest and faithful exercise of that right by others, potentially causing harm. The legal consecration of the principle of good faith as a guiding principle in labor law holds the potential to mitigate situations where one party damages the rights and legitimate interests of others within legal employment relationships. Simultaneously, we identified the need to establish limits on the exercise of subjective rights by participants in legal employment relationships. These considerations, inter alia, underscore the relevance and importance of the chosen research topic.

At the same time, we are aware that scientific research on the abuse of right in employment relationships requires constant updating, given the dynamism and mobility of social relations that shape the legal employment relationship. Thus, no research in the field will fully exhaust the subject.

The research, aligned with the outlined objectives to attain the formulated purpose, has yielded important results:

- A comprehensive notion of the abuse of right within the context of the employment relationship was developed;
- The role of the principle of good faith within legal employment relationships was identified;
- Situations involving the abusive exercise of subjective rights by participants in the employment relationship have been successfully identified;

- Non-abusable rights, particularly those categorized as discretionary or potestative rights, within the context of the employment relationship have been identified;
- Proposals aimed at improving the related legal framework surrounding employment relationships have been formulated.

Their theoretical importance and practical value lies in the possibility of applying the research results in legislative endeavors to enhance existing norms. Additionally, these findings can serve as a starting point for further research endeavors.

The scientific research methodology primarily relied on the following research methods**:**

- ✓ ***The logical method*** was employed, emphasizing a systemic analysis and synthesis approach, which facilitated deductive reasoning and the formulation of various conclusions through a comprehensive examination of the legal framework. The utility of this method became evident in synthesizing diverse doctrinal opinions in the field, creating a "*balanced scoreboard*", which served as the starting point for our research and represents the destination we aim to reach;
- ✓ ***The historical method*** was instrumental in studying the historical evolution of the subject, delving into the theories that underpinned the formation of this concept. This method provided valuable insights into the understanding, recognition, or denial of the concept, reflecting the dynamic nature of society's historical evolution.
- ✓ ***The informational-communicative method*** played a crucial role in comprehending the addressed topic. Active participation in seminars, public discussions, and the exchange of various information facilitated a nuanced understanding of the subject through both transmission and reception of diverse perspectives;
- ✓ ***The comparative method*** enabled a thorough examination of legislation from various states, both foreign and domestic, as well as an in-depth study of foreign and domestic doctrine. This approach involved scrutinizing doctrine and jurisprudence to identify instances of the abuse of right within the legal employment relationship and to classify various forms of misappropriation of subjective rights.
- ✓ ***The synthetic analysis method*** was employed for consolidating the conducted research and formulating conclusions in each chapter, as well as overarching general conclusions and proposals.

Approval of research results. The current study and its findings were presented and deliberated upon during the meeting of the Private Law Department at the Law Faculty of Moldova State University. Subsequently, the research outcomes received approval at the Scientific Profile Seminar within profile 553, Private Law, at Moldova State University. Additionally, the theses

referenced in this study were shared for informational purposes at several international conferences with international participation, and the research findings have been disseminated through publication in scientific papers.

Volume and structure of the thesis. The thesis is organized into four chapters, shaped by the defined purpose and research objectives. The comprehensive structure of the work encompasses annotations in three languages, a list of abbreviations, introduction, four chapters, general conclusions and recommendations, a bibliography, three appendices, and the author's CV.

Thus, the **Introduction** serves to provide an overview of the research offering insights into the justification and relevance of the addressed subject. It outlines the research methods employed, articulates the purpose and objectives of the thesis, and presents the rationale behind the research hypothesis.

Keywords: abuse of right, subjective right, good faith, employee, employer, legal employment relationship, contractual liability, tort liability.

THESIS CONTENT

The Introduction describes the relevance and significance of the addressed topic, highlights the purpose and objectives of the thesis, the research methodology, provides an overview of the current state in the research field, outlines the scientific novelty, the research hypotheses, the theoretical importance and practical value of the work, the approved results, and offers a concise summary of the chapters in the thesis.

In **Chapter 1**, entitled **THE DOCTRINE-PRAXIOLOGICAL DIMENSION OF THE ABUSE OF RIGHT IN THE FRAMEWORK OF LEGAL REPORTS**, the fundamental principles and theses, which contributed to the formation of the theory of the abuse of right, are analyzed. Also, a comprehensive analysis is conducted on doctrinal perspectives, encompassing both local and foreign solutions, along with an examination of the legal framework and pertinent jurisprudence. This chapter aims to illuminate general aspects of the abuse of right within legal relationships, laying the groundwork for its subsequent exploration in the specific context of legal employment relationships.

In Section 1.1., entitled **Analysis of scientific investigations in the matter of the abuse of right within the framework of legal relations in domestic and foreign doctrine**, we make a foray into the theoretical evolution of the concept of abuse of right. This evolution is marked by the clash between two opposing theories on the abuse of right: the absolutism of rights, advocated by Planiol and De Vareills-Sommieres, and the theory of the relativity of rights, represented by Louis Josserand.

The absolutism proponents contended that the theory of abuse of right was not only inaccurate but also dangerous, because the conduct of a right holder should not harm a third party, and any such harmful conduct would be contrary to the law, constituting an illegal act. Marcel Ferdinand Planiol even deemed the theory of abuse of righta logomachia, labeling it as a *contradictio in terminis*, asserting that „the right ends where the abuse begins"[1]. Planiol, along with other eminent jurists such as Duguit,[2] Levy and De Vareille-Sommiere[3], argued against the feasibility of establishing limits within which a subjective right can be exercised, essentially denying the very concept of subjective rights. In their opinion, if there is a subjective right, it can only be absolute.

Louis Josserand, the most vehement critic of the Negativist Theory, argued that proponents of this theory mistakenly conflated the subjective right as a prerogative with the right viewed as a set of rules of conduct. In Josserand's view, a holder of a subjective right can treat with respect the established prerogative or the institution benefiting from legal protection within a particular right (such as the right to private property). Still, they may deviate from reason, as well as from its economic and social objectives. For instance, when exercising their right results in preventing a third party from realizing their right. This is exemplified in the Decision of the Court of Appeal of Amien in the Clément Bayard[4] Case, where the owner of a plot of land, whose neighbor had established an area for the landing and take-off of airships, was sanctioned.

In this case, the first individual installed wooden pillars with metal rods at the top, and the height of these structures posed a threat to the landing and takeoff of airships. Subsequently, the courts determined that this action constituted an abuse of right, as the installation of the metal rods was done with the intention of causing harm to the neighborhood. Consequently, it was established that the exercise of subjective rights must adhere to internal limits that align with the purpose for which the right was established. Applying this principle to employment relationships, if a party in the employment relationship, despite having the right to declare a strike, chooses a timing that would significantly damage the employer's economic activity and adversely impact the beneficiaries of the services provided, it may be considered an abuse of right.

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[1] PLANIOL, M. *Traité élémentaire de droit civil* [online]. 11e ed. Paris: Librairie Generale de Droit et de Jurisprudence, 1931. T. 2. p. 298 [citat 11.03.2022]. Disponibil: https://gallica.bnf.fr/ark:/12148/bpt6k1159982j.

[2] Pentru detalii: Jeuland E. L'énigme du lien de droit. In: *Revue Juridique de la Sorbonne. Sorbonne Law Review* [online]. 2020, no. 1, pp. 144-171 [citat 11.03.2023]. Disponibil: https://irjs.pantheonsorbonne.fr/sites/default/files/inline-files/L_enigme_du_lien_de_droit%20emmanuel%20jeuland.pdf

[3] Lorenzen, E. G. The Validity of Wills, Deeds and Contracts as Regards Form in the Conflict of Laws. In: *The Yale Law Journal* [on-line]. 1911, vol. 20, no. 6, pp. 427-462 [citat 23.11.2021]. ISSN 0044-0094. Disponibil: https://doi.org/10.2307/784503.

[4] *Cour de Cassation, Chambre des requêtes, du 3 août 1915, 00-02.378* [citat 11.03.2023]. Disponibil: https://www.legifrance.gouv.fr/juri/id/JURITEXT000007070363/

The examination of doctrine's preoccupation to formulate a definition to the abuse of right has given rise to two prominent theories: **the first (subjective theory)** places a central emphasis on the concept of intention within the realm of tortious civil liability, and **the second (objective theory)** derives its foundation from the societal purpose of subjective rights. The promoters of the subjective theory employ the moral criterion when assessing the abuse of right, utilizing a psychological and subjective approach that revolves around the intention to cause harm to another party. George Ripert, a notable advocate of this theory, goes further to categorize as abusive any subjective right exercised without benefiting its holder, solely with the purpose of causing harm to another[5]. This theory's rationale is rooted in the Aquilia Law, which underscores the notion of liability and the responsibility of an individual for the harm inflicted upon another due to their fault[6].

Mazeaud and Marty critique the subjective theory, considering it to be restrictive, narrow, and overly individualistic[7], namely for the reason of limiting the concept of abuse of right solely to intentional illegal acts. Since the abuse of right is intricately linked with the framework of tortious civil liability, they assert that the distinction between acts committed intentionally and those resulting from fault is not warranted. In Ion Deleanu's perspective, the abnormal character of a right implies a form of mistake. He argues that, in the context of the subjective theory, this mistake needs to be addressed, as common law has "no circumscription of exception, it will find its full application"[8]..

In their turn, the promoters of the objective theory ignore the criterion of morality in assessing the abuse of right. Instead, they emphasize the crucial benchmark of the law's finality and its functionality aligned with the social purpose. According to this theory, the measure for determining abuse lies in evaluating the legitimate and appropriate reasons behind an action[9]. The genesis of the objective theory lies in the belief that rights, as a general rule, are not absolute but rather relative. Each right is seen as serving a particular function or social purpose. Those who exercise a right contrary to its social function, according to this perspective, commit an abuse of right and are ineligible for legal protection[10]. This theory underscores the conditional nature of rights, emphasizing their alignment with societal goals and purposes.

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[5] RIPERT, G. *Dictionnaire du droit.* Ed. 2. Paris: Dalloz, 1966, p. 11, apud DELEANU, I., *op. cit.,* p. 65.
[6] Pentru detalii despre dezvoltarea conceptului de *culpa:* GIANCOLA, A. *The Development of Culpa Under the Lex Aquilia. In: Vexillum the Undergraduate Journal of Classical and Medieval Studies [on-line]. 2013, issue3, pp. 8-21 [citat 23.02.2023]. Disponibil:* http://www.vexillumjournal.org/wp-content/uploads/2015/10/Giancola-The-Development-of-Culpa-Under-the-Lex-Aquilia.pdf
[7] DELEANU, I., *Drepturile subiective şi abuzul de drept.* Cluj Napoca: Dacia, 1988, p. 64.
[8] DELEANU, I., *op. cit.,* pp. 64-65
[9] GHERASIM, D. . *Buna-credinţă în raporturile juridice civile,* Editura Academiei, Bucureşti, 1981, p. 67
[10] JOSSERAND, L. *De l'esprit des droits et de leur relativite: Théorie dite de l'Abus des Droits* [online]. 2e ed. Paris: Dalloz, 1939, p. 130 [citat 11.03.2023]. Disponibil: https://gallica.bnf.fr/ark:/12148/bpt6k3413740p/f27.item.zoom

Upon examination of the legal framework, it becomes evident that both the subjective and objective criteria find recognition within it. Article 13 of the Civil Code explicitly prohibits the abuse of right, stating that no subjective right should be exercised predominantly with the intent of causing harm or loss to another person. Furthermore, Article 56, paragraph 3 of the Code of Civil Procedure in the Republic of Moldova mandates participants in legal proceedings to use their procedural rights in good faith. Any abuse of these rights or failure to comply with procedural obligations is subject to sanctions as specified in civil procedural legislation.

Consistent with these provisions is the rule outlined in Article 61, which imposes on the parties the obligation to use their procedural rights in good faith. The court is mandated to intervene and put an end to any abuse of these rights, particularly if the abuse is aimed at delaying or misleading the legal process. In instances of submitting procedural requests in bad faith, the responsible party may be held liable and compelled to compensate for any damage caused to the other party. According to these legal texts, the abusive exercise or abuse of procedural rights, when done in bad faith, is deemed an exercise with guilt. Bad faith, characterized by deception, fraud, and gross negligence, is considered a facet of guilt. These regulations, aligning with doctrinal perspectives, position the abuse of right as a breach of good faith within the legal framework.

Section 1.2. Defining elements and the legal nature of the abuse of right. The doctrinal and jurisprudential perspectives on the abuse of right highlight its intricate legal nature. In this regard, we made a clear delimitation between the notion of abuse of right and other meanings, such as interest and contractual opportunism. Although surface-level similarities may exist, these are distinct legal concepts, with the principle of good faith serving as the cornerstone around which they revolve. The abuse of right stands apart from other meanings, and the pivotal factor distinguishing it is the disregard for the principle of good faith. This principle encompasses the trust extended to partners in legal relationships and the reciprocal trust received from these partners. It is the absence of this fundamental principle that sets the abuse of right apart, emphasizing the significance of good faith as the defining element in distinguishing it from other legal concepts.

The situation differs when considering contractual opportunism, a relatively recent concept originating from the Common Law legal system. In both cases, there is adherence to normative provisions (the letter of the law or the contract, as the case may be), but the spirit of the norm or the legal act (of the contract) is violated. Additionally, in the case of contractual opportunism, both the subjective element of bad intentions - beliefs, and the objective element of diverting the right from its intrinsic purpose are present. Contractual opportunism involves the subversion of ethical and moral norms driven by economic interests and the intention to achieve profit by any means. This distinguishes it from abuse

of right and underscores the multifaceted nature of legal challenges posed by these distinct yet interconnected concepts.

Following an analysis of domestic judicial practice, a noteworthy observation emerges regarding the apparent **lack of interest**, or at least **a low level of interest**, from individuals seeking legal recourse for the defense or acknowledgment of the abusive exercise of certain rights. Specifically, an examination of the practice of the Supreme Court of Justice of the Republic of Moldova reveals a limited popularity among litigants who pursue legal actions to challenge the abusive exercise of rights within employment relationships. An in-depth of the decisions of the Civil, Commercial and Administrative Litigation College of the SCJ for the period 2013-2023 clearly shows the absence of cases in which one of the parties to the employment relationship invokes the abuse of right or violation of the principle of good faith. This apparent absence underscores a gap in the legal discourse and may prompt further inquiry into the reasons behind the limited utilization of legal avenues to address issues related to the abusive exercise of rights within the context of employment relationships.

An exception is the appeal request declared by I.M.S.P. Children's Medical Hospital "V. Ignatenco", in the civil case on the summons request of Nicolai Curca against I.M.S.P. Children's Medical Hospital "V. Ignatenco". This case pertains to the decision issued by the Chisinau Court of Appeal on January 22, 2013. The appeal declared by I.M.S.P. Children's Medical Hospital "V. Ignatenco" against the Grigoriopol Court's decision of May 21, 2012, which annulled the order to apply a disciplinary sanction and affirmed the violation of the dignity of work through **the abusive application of said sanction**[11], was rejected and upheld. This particular legal dispute stands out as an exception, providing a rare instance where issues related to the abusive exercise of right within an employment context were brought before the judicial authorities.

From the details of the case presented for resolution, it is apparent that neither the trial courts nor the appeals court explicitly **addressed the issue of finding a violation of the dignity of work through the abusive application of the disciplinary sanction**. Instead, their focus was on **the failure to adhere to the proper legal procedure for subjecting C.N. to disciplinary liability by the employer.** In light of this, it can be inferred that in this specific case, the term "**abusive application of the disciplinary sanction**" signifies a **lack of legality**. In other words, it suggests that the legal framework governing the application of the disciplinary sanction was not followed. This interpretation aligns with the concept that abuse of right involves the exercise of a

[11] *Decizia Colegiului Civil și de contencios administrativ al Curții Supreme de Justiție din 23 octombrie 2013* [online]: dosarul nr. 2ra-2396/13. Chișinău, 2013. 7 p. [citat 09.11.2023]. Disponibil: https://jurisprudenta.csj.md/search_col_civil.php?id=4494

right contrary to its intended purpose, rather than the absence of the right. In this instance, the abuse is tied to the deviation from the prescribed legal procedures for implementing disciplinary measures, highlighting the importance of procedural adherence within the broader context of legal disputes.

From the list of decisions resolved by the Civil, Commercial and Administrative Litigation Board of the the Supreme Court of Justice (SCJ) in the last 10 years[12] a significant trend emerges: out of a total of 57 cases where parties alleged the presence of abusive clauses in civil contracts or the abusive exercise of a right, only one case (!), from 2022, invoked the concept of abuse of right[13]. It's noteworthy that in this singular instance, neither the initial court nor the appellate court nor the Supreme Court of Justice found evidence of abuse of right, the requests of the plaintiff V.A. being partially admitted. against Chisinau City Hall.

Also, in the period 2013-2023, the Supreme Court of Justice (SCJ) rendered judgments on 49 cases wherein petitions sought recognition as an acquirer, owner, or buyer in good faith, but it refrained from adjudicating matters related to the exercise of labor rights and obligations in good faith. A recent decision issued by the SCJ[14], has brought attention to the admissibility of an appeal within a civil case centered around summonses concerning the annulment of an order. This case involves the reinstatement to a previously held position, the recovery of salary payments, claims for moral damages, and the reimbursement of court costs. The decision delves into the crucial aspects of preventing the abuse of right and ensuring the parties involved in the civil process exercise their procedural rights in good faith.

Thus, the court stated that "... the participants in the trial, being aware of the legal provisions and the court-issued disposition documents, should comply with them diligently and exercise their procedural rights responsibly. This obligation, as outlined in Article 56(3) and Article 61(1) of the Code of Civil Procedure, **mandates participants to act in good faith when utilizing their procedural rights. The court underscored that any abuse of these rights or failure to fulfill procedural obligations will result in the application of sanctions stipulated by civil procedural legislation. Furthermore, the court clarified that it intervenes to curtail any misuse of procedural rights with the intent to delay or mislead the legal process.** Good

[12] Sursa: Baza de date a hotărârilor Colegiului civil, comercial și de contencios administrativ al CSJ [on-line]. [vizualizat 23.11.2023. Disponibil: https://jurisprudenta.csj.md/db_col_civil.php

[13] *Încheierea Colegiului Civil și de contencios administrativ al Curții Supreme de Justiție din 17 august 2022*[on-line]: dosarul nr. 3ra-702/22. Chișinău, 2022. 17 p. [citat 09.11.2023]. Disponibil: https://jurisprudenta.csj.md/search_col_civil.php?id=68199

[14] *Încheierea Colegiului Civil și de contencios administrativ al Curții Supreme de Justiție din 25 ianuarie 2024*[on-line]: dosarul nr. 2ra-289/23. Chișinău, 2024. 11 p. [citat 25.01.2024]. Disponibil: https://jurisprudenta.csj.md/search_col_civil.php?id=73511

faith, as a guiding principle, implies that parties must, at reasonable intervals, demonstrate diligence by staying informed about the progress of cases in which they are involved on the court's docket. Additionally, parties are expected to respect the legally prescribed deadlines[15]".

In light of these principles, the court deemed the appeal inadmissible, signaling its commitment to upholding the integrity of the legal process and preventing any abuse of procedural rights.

The legislation of the Republic of Moldova establishes specific principles governing the exercise of subjective rights held by individuals participating in legal relations. These principles serve as fundamental guidelines to ensure the fair and lawful exercise of rights within the legal framework of the country.

Article 55 of the Constitution of the Republic of Moldova articulates the foundational principles that underpin the exercise of rights and freedoms, establishing that individuals are expected to exercise their constitutional rights and freedoms in good faith, ensuring that such exercise does not encroach upon the rights and freedoms of others. This principle is based on two key pillars of legal doctrine: the principle of good faith and the obligation to respect the rights of others. Furthermore, the Civil Code of the Republic of Moldova[16], specifically in Article 10, expounds on the positioning of the abuse of right within the realm of civil legislation. The article outlines that both natural and legal persons engaged in civil legal relations are obliged to exercise their rights and fulfill their obligations in good faith. This entails adherence to the provisions of the law, contractual agreements, public order, and ethical standards. In essence, Article 10 underscores the importance of responsible and lawful conduct in civil interactions, emphasizing the fundamental principles of good faith and legal compliance in the exercise of rights and fulfillment of obligations.

Although it does not expressly refer to the abuse of right, this norm establishes the conditions for the exercise of the abuse of right, which we will provide details in the next chapter. More than that, this article of the Civil Code enshrines good faith as a fundamental principle of law, and bad faith must be proven. These regulations qualify the abuse of right, like the doctrine, as a form of breach of good faith. Art. 13 of the Civil Code, entitled **Abuse of right**, establishes that no subjective right can be exercised predominantly with the aim of causing another person a loss or harming him in any other way. In the light of these legal texts, taking into account one of **the assumed objectives**, we can define the abuse of right as ***the exercise of the subjective right***

[15] *Idem* , p. 10. [citat 25.01.2024]. Disponibil: https://jurisprudenta.csj.md/search_col_civil.php?id=73511
[16] Codul civil al Republicii Moldova: nr.1107 din 06.06.2002. In: *Monitorul Oficial al Republicii Moldova*. 2019, nr. 66-75. ISSN 2587-389X.

with the aim of harming another, in an excessive and unreasonable manner, contrary to good faith.

The implicit definition of the abuse of right, as outlined by the Moldovan legislator, encompasses both the subjective and objective dimensions. On the subjective side, it underscores the significance of exercising rights in bad faith, while on the objective side, it emphasizes the deviation of the right from its intended social and economic purpose. This deviation may manifest either through an intentional act to harm another or through an excessive and unreasonable exercise of the right. The legal texts stated above are marked by the idea that the subjective right is not absolute, the prerogatives conferred by it to its holder, can only be used in accordance with the law and good morals, within the limits of normality and reasonableness, according to the destination socio-economic for which they were established, respecting the rights of other members of society. This condition for the exercise of subjective rights and the execution of obligations represents a moral precept not to cause harm to another.

Regarding the regulations on the abuse of right in the Labor Code of the Republic of Moldova[17], it is regrettable to observe a legislative gap in this particular aspect. Notably, the principle of good faith, serving as a standard of conduct, is not expressly addressed in labor legislation. However, there is a limited exception found in Article 9, paragraph 2 of the Municipal Code of the Republic of Moldova, which imposes an obligation on employees to conscientiously fulfill the obligations specified in their individual employment contracts. The Russian version of this code articulates this obligation as follows: "*Работник обязан добросовестно выполнять свои трудовые обязанности, предусмотренные индивидуальным трудовым договором*" — in a free translation, this means that the employees must fulfill their work obligations in good faith.

Simultaneously, the use of the term **conscientious** by the legislator in Article 9 of the Labor Code mirrors the provision in Article 2 of the Municipal Code of the Moldavian Soviet Socialist Republic. This former article established that *the employees is obligated (1) to conscientiously fulfill their work obligations.* A logical-grammatical interpretation, viewed through the lens of the principle of exercising rights and freedoms with diligence and prudence, justifies the belief that **conscientiousness** in the employee's conduct represents an aspect of good faith. Moreover, it is our inclination to consider that the level or **degree of conscientiousness** exhibited by the employee is directly proportional to the manner in which **dignity at work** is maintained and guaranteed, as defined by Article 1 of the Labor Code of the Republic of Moldova, emphasizing the importance of a comfortable psycho-emotional climate in labor relations.

[17] Codul muncii al Republicii Moldova: nr. 154 din 28.03.2003. In: *Monitorul Oficial al Republicii Moldova*. 2003, nr. 159-162. ISSN 2587-389X.

In **Chapter 2,** entitled **THE POSITION OF THE INSTITUTION OF ABUSE OF RIGHT IN THE FRAMEWORK OF LEGAL EMPLOYMENT RELATIONS,** we have examined issues relating to the limits of the exercise of subjective right, addressing the institution of subjective right as a central one in the context of abuse of right. In this chapter we have identified the principles of exercising subjective rights including in the context of legal employment relations, as well as the functions of the good faith principle in a legal employment relation, whose characteristic feature is the subordination of the employee to the employer. This chapter also thoroughly investigates subordination as a defining factor in legal employment relations and a prerequisite for potential abuse of right. We outline the rights inherent in legal employment relations that are safeguarded against abuse, providing a comprehensive examination of the nuanced dynamics within this framework.

1) In **Section 2.1. The exercise of the subjective right in legal employment relations**, we argued that the existence of a subjective right is an essential condition for the commission of abuse of right, identifying the principles of exercise of the subjective right. Based on the subjective right, the person is entrusted with certain competencies, powers and prerogatives, which are not absolute and must be exercised taking into account the limits of exercise, according to Article 10 of the Civil Code of the Republic of Moldova and Article 55 of the fundamental law of the country - the Constitution of the Republic of Moldova, which establishes the principles of exercise of subjective rights.

The study of jurisprudence and the related legal framework facilitates the formulation of the following principles for the exercise of subjective rights:

The principle of legality, under which legal recognition and protection of a subjective right can only occur if it is achieved according to the letter and spirit of the law. This principle establishes the connection between the subjective right and the objective right, giving it legitimacy in the process of realization. Undoubtedly, each holder of a subjective right pursues, through its exercise, a personal interest (e.g., every citizen of the Republic of Moldova has the right to work freely chosen or accepted, the right to dispose of his work capacities, the right to choose his profession and occupation), but this interest must be direct, actual, legitimate and benefit from legal protection, being in accordance with the general interest and the rules of social coexistence[18].

The employee, according to the legal definition, set out in Article 1 of the Labour Code of the Republic of Moldova, is a natural person (man or woman), who performs work according to a

[18] POJAR, D. (2022) *Some reflections upon the subjective right and the abuse of right doctrine/ Unele reflecții cu privire la dreptul subiectiv și doctrina abuzului de drept*, *Journal of Social Sciences*, Numărul 5(1) / 2022, pp. 106-111, / ISSN 2587-3490 /ISSNe 2587-3504, doi.org/10.52326/jss.utm.2022.5(1).12, cat. B+.

certain specialty, qualification or in a certain position, in exchange for a salary, under an individual employment contract. The subjective rights of the employee (to conclude and, implicitly, to amend and terminate the individual employment agreement; to work according to the terms of the individual employment agreement; to the full and timely payment of salaries corresponding to the employee's qualifications and in relation to the work tasks performed) are aimed at achieving a personal interest of the individual: employment in the field of work in order to earn a salary that will allow him to lead a decent life. But, the exercise of these subjective rights listed above must satisfy only an absolutely lawful interest: direct, actual, legitimate, legally protected, according to the general interest and the rules of social coexistence. *Per a contrario*, in the case of disagreement with the general interest and the rules of social coexistence, the exercise of these rights would be prohibited, as established by the local legislator in Art. 46, para. (8) of the Labour Code of the Republic of Moldova - it is prohibited to conclude an individual employment contract for the purpose of performing illegal or immoral work or activity. In this case, the letter of the law reiterates the existence of a lawful interest: direct, actual, legitimate, legally protected, in accordance with the general interest and the rules of social coexistence.

The principle of exercising a right with respect for public order and morality dictates that the holder of a subjective right must consider and adhere to the norms of social and moral conduct when exercising that right. This principle underscores the responsibility of individuals to ensure that their exercise of subjective rights aligns with broader societal standards and ethical considerations, promoting a harmonious balance between individual freedoms and the well-being of the community.

The principle of the exercise of the subjective right in good faith, according to which right-holders must exercise their fundamental rights and freedoms in good faith without infringing the rights and freedoms of others. This principle is enshrined both at constitutional level, in the fundamental law of the Republic of Moldova, and in the Civil Code of the Republic of Moldova, where Art. 10 provides that natural and *legal persons participating in civil legal relations must perform their obligations in good faith.*

Based on these principles of exercising generally-recognized subjective rights, we have formulated the proposal to complete the Labour Code of the Republic of Moldova with rules, which would expressly state that the exercise of the rights of the subjects of the employment relation, both collective and individual employment, must be carried out under the principles of exercising subjective rights, without harming the interests and rights of other subjects. Particularly, we propose to complete the Labour Code of the Republic of Moldova with a new Chapter - Chapter II[1], entitled Exercise and protection of labour rights, as well as to include in the content of this

chapter **Art. 14[2]**, entitled **Exercise of labour rights and fulfilment of labour obligations,** in the following version:

1. In exercising their rights and fulfilling their obligations, employers, employees and their representatives must act in good faith. Abuse of right by either party is prohibited.

2. The exercise of employment rights and the fulfilment of employment obligations must not violate the rights and interests of other persons, which are protected by law.

In **Section 2.2 The principle of good faith in the legal employment relations,** we have carried out a study of the principle of good faith in the context of the legal employment relations. As a result, we formulate the opinion that the nature and character of the principle of good faith applicable in labour law does not differ from those applied to other branches of law, because also in the context of employment relations, good faith imposes on the subjects of this relation rights and obligations that limit the autonomy of will and the exercise of subjective rights. Thus, good faith is a fundamental principle which influences all the institutions of labour law and obliges the subjects of the employment relation to behave in accordance with this principle, and the exercise of subjective rights in bad faith is one of the ways of committing an abuse of right.

As commonly recognized, the concept of good faith in civil law, and implicitly in labor law, encompasses two aspects: *objective good faith* and *subjective good faith*.

Objective good faith is synonymous with objectively judged loyalty according to the rules established between honest people. It is opposed to deceit, fraud and abuse of right in the conclusion of legal acts, including those governing employment relations. By means of this form of good faith, „the judge interprets the agreement in order to mitigate its rigour or to make new circumstances applicable to it[19]".

Subjective good faith represents mistaken belief, sincerity, the antithesis of dissimulation and lying. As a rule, it rests on a large number of apparent situations, referred to in civil law as the *theory of appearance*.

In the realm of labor law, subjective good faith holds significant implications, particularly in the domain of collective labor law, especially in the prohibition of specific unfair practices (Art.17, letter g) of the Labour Code of the Republic of Moldova. This provision underscores one of the fundamental principles of social partnership, emphasizing the importance of mutual trust between the parties within this relational system. Subjective good faith plays a crucial role in delineating grounds that may lead to the disciplinary termination of an individual employment

[19] VOUIN, R., . *La Bonne foi: notion et rôle actuels en droit privé français*: Thèse. Paris: LGDJ, 1939, p. 34

agreement. It is also invoked in cases involving the issuance and use of work-related documents in bad faith, as well as in the prohibition of simulations with an illicit character. These applications highlight the nuanced and multifaceted role of subjective good faith in shaping and regulating various aspects of labor relations.

These theories of good faith aspects outlined above are fully applicable to employment relations. With regard to the Individual Employment Agreement, we deal with objective good faith because the conduct of the contracting parties is governed by the general idea of honesty and decency. If good faith is a rule based on certain individual judgements, then it is logical that good faith should be assessed according to objective parameters. In this sense, objective good faith is intended to harmoniously combine private and general interests in the performance of contractual obligations. Thus, "the party to the individual employment agreement shall exercise his/her rights and perform his/her obligations unreasonably, in good faith, the objective aspect of which is a rule of conduct rather than a subjective state of conscience. Objective good faith imposes high standards for the adjustment of the conduct of the subjects of the legal employment relation to the rules of morality and ethics and to legal rules[20]".

The significance of the principle of good faith in employment relations is underscored by the three fundamental functions it serves in this domain, as illustrated in Figure 1:

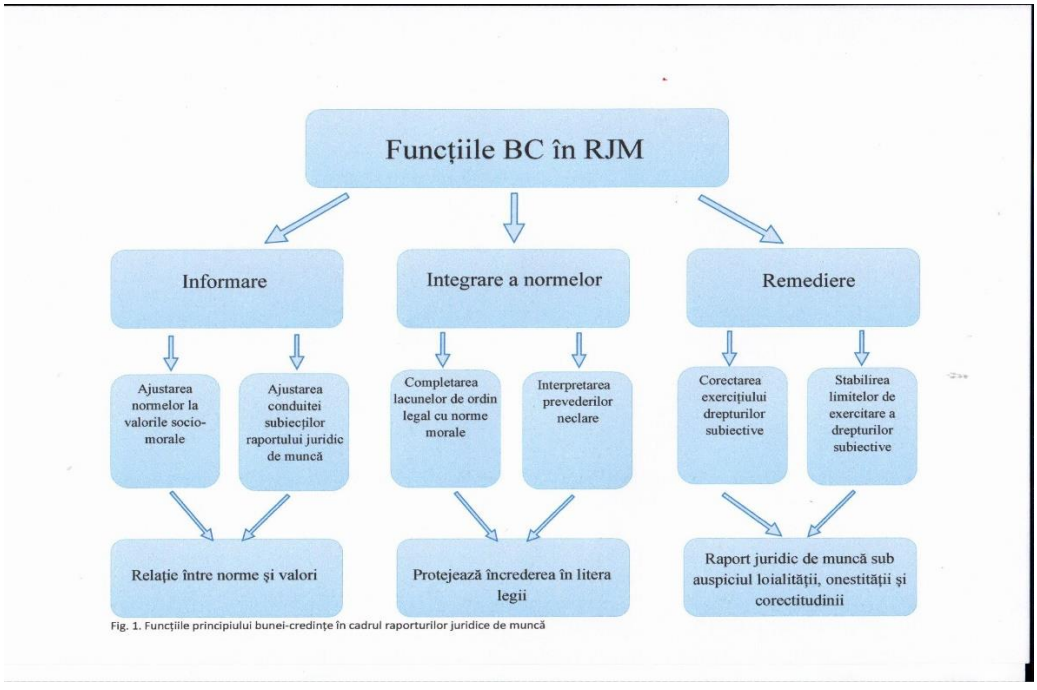


Figure 1. Functions of Good Faith in Employment Relations

[20] POJAR, D. (2015), *Principiul bunei-credințe în raportul juridic de muncă* în lucrările Conferinței Internaționale PROCESUL CIVIL SI EXECUTAREA SILITA, TEORIE SI PRACTICA, 25-27 august 2015, Târgu Mureș, România, Ed.: București, Universul Juridic, 2015, pp. 250-256, ISBN 978-606-673-682-4

Functions of Good Faith in Employment Relations					
Information		**Integration of standards**		**Remediation**	
Adjusting norms to socio-moral values	Adjusting the behaviour of the subjects of the legal employment relation	Filling legal gaps with moral standards	Interpretation of ambiguous provisions	Correcting the exercise of subjective rights	Establishing the limits to the exercise of subjective rights
Relation between norms and values		Protects confidence within the letter of the law		Legal employment relation under the auspices of loyalty, honesty and fairness	

Section 2.3. Subordination - the determinant of the legal employment relation – premise of abuse of right. Rights arising from the content of the legal employment relation which are not liable to abuse. The determinant of the legal employment relations - the subordination of the employee to the employer marks the typology of obligations arising from the conclusion of the individual employment contract. The analysis of the legal subordination of the employee in relation to the employer has also revealed the existence of abuse of right by the employer in the context of the relegation of the prerogatives that the law confers on him. Very often, the abusive exercise of the employer's rights is doubled or transformed into illicit behavior materialized in actions of direct or indirect discrimination against employees, as well as in actions of moral harassment at the workplace, due to the authority he holds in relation to the employee. We also identified cases, where the employee, using the legal requirements contrary to their principles, acts in bad faith, frequently abusing his rights.

There are, however, rights in the content of the employment relations that are not liable to abuse. This category includes the so-called potestative rights, recognized by our doctrine and established by the German and Italian legal systems. These represent a variety of subjective rights, the typology of which lies in the power conferred on a person to cause a legal effect on the legal situation of another person, without the latter being able to object[21].

According to the Romanian author I. Tr. Stefanescu[22], in terms of labour relations, the issue of abuse of right cannot be addressed in relation to those rights that the legislator leaves to the

[21] For details see CAZAC, O. *Adnotare la art. 2* (online), Codul civil adnotat (citat la 23.02.2023), disponibil https://animus.md/adnotari/2/.
[22] ȘTEFĂNESCU, I. T., op.cit.,p.46

exclusive discretion of one of the parties to the employment contract. In this category, for example, I. Tr. Stefanescu included:

- the employee's right to resign, arising from his employment agreement concluded for an indefinite period (obviously in compliance with the legal obligations concerning notice or written notification). **We consider, *in extenso,* the application of this right also to individual fixed-term employment agreements;**

- the employer's right to determine his/her turnover without any interference, which also affects the situation of his/her employees;

- the employer's right to decide on the organization and functioning of the unit;

- the employee's right to dispose of his/her salary;

- the employee's right to refuse any diminution of his/her rights.

In this context, we can also add that the following rights are not liable to abuse:

- employee's right to object in the context of the processing of personal data, as defined in Art. 16 of Law No 133 of 2011 on the Protection of Personal Data and Art. 94 of the Labour Code of the Republic of Moldova;
- employee's right to request means of personal protection in order to ensure health and safety at work;
- employer's right to require employees to fulfil their work obligations and manifest a good housekeeping attitude towards his/her property - this being the essential element of the reason for employing the employee.

Excluding the rights that are not liable to abuse, as previously mentioned, the potential for the abusive exercise of rights permeates the entire spectrum of the employment relationship. This encompasses the negotiation and conclusion of individual or collective employment agreements, the execution and ongoing performance of these agreements, as well as instances related to the suspension or termination of individual or collective employment agreements.

Addressing the actor committing an abuse of right and deviating from the intended principles, we differentiate between instances of abuse by the employer and those by the employee. Additionally, the abusive exercise of rights may extend to entities within the collective employment relationship, including unions, employee representatives, where applicable, as well as employers or their representatives.

In **Chapter 3,** entitled **IDENTIFYING SITUATIONS OF THE ABUSE OF RIGHT IN THE FRAMEWORK OF EMPLOYMENT RELATIONS**, we present the constitutive elements of the abuse of right in labour relations, namely: the subjective element of bad faith and the objective element, of diverting the right from reason its intrinsic and from the legal purpose

for which it was established, as well as the situations in which the employer abuses his rights and the situations in which the employee commits an abuse of right have been determined.

While it is obvious that instances of the abusive exercise of subjective rights by employees are considerably lower compared to the occurrence of such incidents in the context of employer's rights, reported cases still exist. These cases may arise during the negotiation, execution, modification, and termination phases of individual employment contracts. **Section 3.1, Abusive exercise of employee's rights,** addresses instances of rights abuse by employees throughout the stages of contract initiation, execution, modification, suspension, and termination

Due to the subordination relations, specific to the legal employment relations, the intervention of situations of abuse of right by the employee at the stage of concluding the individual employment contract are rare. Of major significance as the main source of labour relations, the individual employment contract is concluded based on negotiations between the employee and the employer, according to the provisions of Art. 56 of the Labour Code of the Republic of Moldova. Expression of the principle of consensualism and contractual solidarity, as we deduce from the content of Art. 11 of the Labour Code of the Republic of Moldova, the individual employment contract as the central institution of labour law is intended to formalize a legal relationship, based on principles of loyalty, honesty, cooperation, diligence and no less importantly on principles that are intended to defend the mutual interests of the parties. At the stage of negotiating the contractual clauses (as well as later, at the time of the execution of the individual employment contract), the conduct of the parties is limited to contractual freedom, which is carried out through the prism of the *in favorem* principle, in the sense that the derogation from certain precepts established by the Labour Code and other sources of labour law can only take place in the context of improving the employee's situation[23].

In Romanian doctrine[24], an opinion was formulated with reference to the existence of a situation of inequality between the parties at the time of concluding the individual employment contract, which is due to the subordination relationships of the employee to the employer and, in such conditions, the principle governing the free negotiation of the clauses of the individual employment contract is violated. Such a situation transforms the individual employment contract from a negotiated one into an adhesion one, giving an abusive character to its clauses, the freedom of the future employee being limited only to the right to decide whether to be engaged or not, to

[23] Pentru detalii referitor la principiile aplicabile legislației civile a se vedea: CAZAC, O. Adnotare la: Articolul 1. Principiile legislaţiei civile [on-line]. In: *Codul civil adnotat*. 2021 [citat 23.02.2023]. Disponibil: https://animus.md/adnotari/1/.

[24] PRIBAC, V., *Abuzul de drept şi contractele de muncă.* Bucureşti: Wolters Kluwer România, 2007., pp. 76-77.

conclude or not to conclude, as the case may be, the individual employment contract. At a first examination of this opinion, we would be tempted to accept it. More than that, an eloquent example under this aspect is, in our view, the standard model of the individual employment contract, approved under the Collective Contract (national level) no. 4 of July 25, 2005 regarding the individual employment contract model[25]. The purpose of this Convention, as it follows from its point 1, is to ensure the uniform application of the provisions of the Labour Code, approved by Law no. 154-XV of March 28, 2003, regarding the conclusion of individual employment contracts. This uniform application was misunderstood by many employers, as a result individual employment contracts had for a long time the character of true contracts of adhesion or becoming only a formality for the legislation of labour relations. Even if, art. 65, para. (1) of the Labour Code of the Republic of Moldova establishes that *based on the individual employment contract negotiated and signed by the parties, the employer may issue an employment ordinance (disposition, decision, resolution)*[26], in practice, in many cases, the signing of the contract (and not the conclusion, because often the date indicated at the conclusion is different from the date of signing) is subsidiary to the issuance of the order and represents a formality. However, analyzing the content, we deduce that the respective model of the individual employment contract contains abusive clauses, as defined in Art. 1077 of Civil Code of the Republic of Moldova, because they do not in any way worsen the situation of the employee.

At the same time, Art. 1081 of Civil Code of the Republic of Moldova excludes from the scope of the respective provisions the contracts regulated by the Labour Code. Another argument, which we present in support of our opinion, is the one regarding the content of the rule from art. 48 of the Labour Code of the Republic of Moldova, which stipulates that the employer is obliged to inform the employee prior to employment or transfer to a new position about the conditions of activity in the proposed position, providing him with all the necessary information. The information in question will be the subject of a draft individual employment contract or an official letter, signed by the employer with an electronic signature or with a holographic signature. The obligation to inform the person selected for employment or the employee, in case of transfer, is considered fulfilled by the employer at the time of signing the contract or the additional agreement to the individual employment contract. In the opinion of the authors Eduard Boisteanu and Nicolae Romandas, Art. 48 of the Labour Code of the Republic of Moldova enshrines the so-called

[25] Convenția Colectivă (nivel național) cu privire la modelul Contractului individual de muncă: nr. 4 din 25.07.2005. In: *Monitorul Oficial al Republicii Moldova*. 2005, nr. 101-103. ISSN 2587-389X.
[26] Codul muncii al Republicii Moldova: nr. 154 din 28.03.2003. In: *Monitorul Oficial al Republicii Moldova*. 2003, nr. 159-162. ISSN 2587-389X.

informed consent[27], which is based on the principle that each potential employee represents a rational individual, with a well-developed spirit of self-determination, having the necessary discernment to make a correct choice and make decisions.

We contend that the misinterpretation of the Collective Agreement provisions, coupled with an excessive enthusiasm in its application, may be categorized as an abusive exercise of the employer's right to negotiate. In our perspective, this serves as an exemplification of the objective criterion for qualifying a right as excessively exercised, even in the absence of malicious intent, leading to an abnormal nature in the exercise of that right.

A remedy to counteract potentially abusive clauses within the content of individual employment contracts is provided by Article 12 of the Labour Code of the Republic of Moldova. This article states that clauses within individual contracts, which detrimentally affect employees compared to labor legislation, are considered null and void. Professor Alexandru Ticlea[28] adds to the list of prohibited or abusive clauses those that contradict public order and good morals. We assert that the prohibition of the abuse of subjective rights in the employment relationship, encompassing the potentially abusive negotiation of contract clauses, transforms the stage of concluding an individual employment contract from a mere formality to a substantive process. This shift ensures that both parties, especially the employee, comprehend their expectations and responsibilities. Simultaneously, the negotiation stage fosters complete awareness for the employee, emphasizing that their rights are not absolute, even though they may represent the more vulnerable party in the employment relationship.

Despite the protective nature of labor legislation towards employees, it is crucial to acknowledge the possibility of employees abusing their rights. For instance, a situation may arise where an employee, participating in the employer's selection process and subsequently being selected for employment, intentionally refrains from entering into an individual employment contract without valid grounds or serious reasons. In such instances, the employee may engage in such behavior solely with the intent to harass the employer or other employees, thereby abusing the rights granted by the law. This underscores the importance of maintaining a balanced approach in employment relationships, recognizing that rights and responsibilities should be respected by both parties.

The most eloquent examples of the intervention of the abuse of right during the execution, modification and suspension are travel in the interest of work, as these are regulated in the

[27] BOIȘTEANU, E., ROMANDAȘ, N., *Dreptul muncii:* Manual. Chișinău: [S. n.], 2015., p. 344.
[28] ȚICLEA, A., *Dreptul muncii:* curs universitar. București: Rosetti, 2004, p. 246.

legislation of the Republic of Moldova[29]. For example, in the situation where the employee is sent on work-related travel and does not intentionally communicate to the employer that there is a need to limit travel due to one of the reasons provided for in art. 249 of the Labour Code of the Republic of Moldova, subsequently the employer suing the court for non-compliance with these legal provisions. According to the provisions of paragraph (2) of this article, sending on work-related travel is limited, i.e., it requires the written consent of the following categories of employees: *people with severe and pronounced disabilities, pregnant women, women on postnatal leave, single parents who have children up to 14 years old, employees who have children up to 6 years old or children with disabilities, people who combine leave for child care with work, as well as employees who care for a sick family member, based on the medical certificate.* Simultaneously, the employer is obliged to inform the mentioned employees in writing about their right to refuse to go on travel. At para. (1) of the same article provides for the prohibition to send people who have medical contraindications for travel on business travel. In practice, it occurs situations when the employee hides from the employer the fact that he is in such a situation, and the employer orders him to be sent on work-related travel. Later, the employee, being in bad faith, takes the employer to court, requesting compensation for the damage caused. In this case, the employee commits an abuse of right.

In cases where valid reasons exist for the employee to decline work-related travel, the assessment of the legitimacy of the employee's personal reasons can be appropriately conducted through the application of the theory of abuse of right. Consequently, the employee's refusal to engage in work-related travel should be deemed justifiable only if it is genuinely linked to the prevention or adverse impact on fulfilling specific family obligations, rather than being driven by a mere desire to harass the employer. This approach ensures a fair evaluation of the employee's actions, considering both the legitimate needs of the individual and the essential requirements of the employer.

Indeed, instances of abuse of right by employees can occur during the execution of individual employment contracts. Some reported situations involve employees deliberately concealing information from the employer to manipulate circumstances and potentially provoke violations of their rights and guarantees. For instance, an employee might hide their temporary incapacity for work, leading the employer to unwittingly commit violations of the employee's

[29] Pentru detalii a se vedea: POJAR, D. (2014), *Unele reflecții cu privire la intervenția abuzului de drept la încheierea contractului individual de muncă* în lucrările Conferinței Internaționale *PROCESUL CIVIL SI EXECUTAREA SILITA, EXPERIENȚA UNUI NOU ÎNCEPUT, 28-30 august 2014, Târgu Mureș, România,* Ed.: București, Universul Juridic, 2014, pp. 212-223, ISBN 978-606-673-457-8

rights. Similarly, another scenario involves an employee concealing their trade union membership to induce the employer to make procedural errors when applying sanctions for work discipline violations. In these cases, employees are exercising their rights in bad faith, highlighting the importance of transparency and honest communication in the employment relationship to foster a fair and respectful working environment. Addressing such issues requires a balanced approach that ensures the protection of both the employee's rights and the employer's ability to maintain a well-regulated workplace.

The abusive exercise of an employee's rights upon termination of the individual employment contract, although uncommon, can manifest in situations where the right to resign is exploited. For example, an employee may abuse this right by not submitting the resignation request in writing, instead only verbally informing the employer of the intention to resign. In response, the employer may terminate the employment relationship based on the verbal notice. In some cases, an employee acting in bad faith may appeal to the court regarding this omission by the employer, even if the true intention is to resign. Such legal actions may be pursued with the sole purpose of harassing the employer.

Furthermore, if a collective decision is made by all or a majority of employees in a particular unit to resign, it can be deemed abusive and exercised in bad faith. Such a collective decision may be intended to pressure the employer into accepting certain demands or intentionally cause harm to the employer. Addressing these situations requires a careful examination of the circumstances to ensure a fair balance between protecting employees' rights and preventing abuse that may negatively impact employers.

Abusive exercise of the right to resign occurs, for example, in the situation where as a result of the violation of work discipline, the maximum sanction - disciplinary dismissal - can be applied, but the employer proposes to resign on his own initiative. At a first stage, the employee accepts this offer, submits the resignation request, but being in law, according to art. 85, para. (4) from the Labour Code of the Republic of Moldova within 7 calendar days to withdraw his request or cancel the first one, delays the resignation process. The employer did not comply with the necessary procedure for the dismissal of the employee, according to the provisions of art. 86, para. (1) from the Labour Code of the Republic of Moldova. Consequently, the employer relying on the agreement he had with the employee, considering that he will act in good faith, omits the term required for the dismissal procedure. Thus, we are in the presence of an abuse of right, committed by the employee, who uses the subjective right provided for in art. 9, para. (1), lit. a) to terminate the individual employment contract, according to the rigors of the Law.

It is difficult to imagine that the employee could abuse his rights in the case of dismissal, which represents the termination of the individual employment contract for an indefinite period, as well as the one for a fixed period, at the initiative of the employer, and can operate in the case of the existence the grounds expressly indicated in art. 86 of the Labour Code of the Republic of Moldova. Even if this represents the unilateral expression of the employer's will to terminate the employment relationship, this fact does not exclude the possibility of the employee committing an abuse of right. The Moldovan legislator establishes in paragraph (2) of art. 86 of the Labour Code of the Republic of Moldova a series of protective measures, which limit the dismissal of employees.

Section 3.2. Abusive exercise of the employer's rights describes a multitude of situations in which the employer may abusively exercise his rights in connection with the conclusion, execution, modification, suspension and termination of the individual employment contract.

Labour law does not expressly prohibit the abusive exercise of the employer's subjective rights, but Art. 10 para. (2) of the Labour Code of the Republic of Moldova requires the employer to respect the provisions of laws and other normative acts, as well as the clauses of collective and individual labour contracts. Furthermore, Article 8 of the Labour Code of the Republic of Moldova stipulates that the principle of equality of rights of all employees applies in the employment relationship, prohibiting any direct or indirect discrimination on various criteria. However, the legislator allows derogations from this rule when these exceptional situations are determined by the specific requirements of a job, established by the legislation in force, or by the special concern of the state for persons who require greater social and legal protection.

By establishing these provisions as guiding principles in employment and related relations, the legislator restricts the instances where the employer could potentially abuse their rights. This involves the prevention of the employer from exercising their rights beyond their inherent limits and in a manner contrary to their intended purpose, with the intention to harm the employee. To minimize the occurrences and conditions that could lead to the abuse of right and unlawful actions by the employer, the legislator has implemented a set of safeguards specifically designed for the conclusion, performance, amendment, suspension, and termination of individual employment contracts. These safeguards aim to create a framework that fosters fair and lawful interactions between employers and employees.

Article 172 of the Labour Code of the Republic of Moldova introduces the concept of "warranty," referring to the means, methods, and conditions established to ensure the realization of rights granted to employees within the realm of labor relations and other associated social connections. These warranties are provided to employees starting from the commencement of their

employment until the termination of the employment relationship, especially in circumstances such as work-related travel, job relocation to another locality, simultaneous work and studies, and more. Through these provisions, the legislator has effectively elevated the status of the employee, recognizing them as a vulnerable party within the employment relationship. This underscores the characterization of the Labour Code of the Republic of Moldova as a social code, emphasizing its role in safeguarding and promoting the rights and well-being of employees throughout the various phases of the employment relationship. Contrary to the legal precepts, the employer's rights are liable to be exercised abusively, i.e., in violation of the principles of their exercise in the conclusion, execution, modification, suspension and termination of the individual employment contract.

Article 47 of the Labour Code of the Republic of Moldova plays a pivotal role in preventing unjustified refusal of employment. This provision explicitly prohibits both direct and indirect limitations and the establishment of advantages based on discriminatory criteria. Moreover, it mandates that the employer's refusal to hire must be documented in written form, and such decisions are subject to appeal in court. Through this law, the legislator ensures the unimpeded exercise of the right to work and the freedom to work. It serves as a protective measure against potential abuses by employers in employment matters[30]. By requiring transparency in the hiring process and providing a legal avenue for recourse, Article 47 aims to create a fair and just environment for both employers and prospective employees.[31].

It is quite difficult to qualify as abusive or not the exercise of the right not to hire. Since the individual employment contract is concluded as a result of negotiations between the employee and the employer, we consider that the employer cannot abuse his right to employ in a situation where the individual employment contract is concluded on the basis of the freely expressed will of the parties. At the same time, the judicial practice and doctrine states that unjustified refusal of employment is found in situations when, according to the provisions of para. (1) of Art. 56 of the Labour Code of the Republic of Moldova, the conclusion of the individual employment contract may be preceded by specific circumstances (holding a competition, election to a position), thus verifying the professional aptitude of the potential employee. As a rule, these specific

[30] Pentru detalii a se vedea: POJAR, D. (2014), *Unele reflecții cu privire la intervenția abuzului de drept la încheierea contractului individual de muncă* în lucrările Conferinței Internaționale *PROCESUL CIVIL SI EXECUTAREA SILITA, EXPERIENȚA UNUI NOU ÎNCEPUT, 28-30 august 2014, Târgu Mureș, România,* Ed.: București, Universul Juridic, 2014, pp. 212-223, ISBN 978-606-673-457-8

[31] Pentru detalii a se vedea: POJAR, D. (2014), *Unele reflecții cu privire la intervenția abuzului de drept la încheierea contractului individual de muncă* în lucrările Conferinței Internaționale *PROCESUL CIVIL SI EXECUTAREA SILITA, EXPERIENȚA UNUI NOU ÎNCEPUT, 28-30 august 2014, Târgu Mureș, România,* Ed.: București, Universul Juridic, 2014, pp. 212-223, ISBN 978-606-673-457-8

circumstances precede employment in the public sector, but there are situations where they also apply in the private sector. Regarding the criteria used for the employment of Art. 10(10)(a) and (b). (2) of the Labour Code of the Republic of Moldova establishes in letter f^{1}) that *the employer is obliged to ensure equal opportunities and treatment of all persons in employment according to the profession, vocational guidance and training, promotion in the service, without any discrimination.*

In order to identify whether the employer's right to conclude an individual employment contract is exercised unfairly, it is essential to consider the conditions outlined in the first chapter of the thesis regarding the abuse of right. The specific conditions may include:

- ✓ *Lack of legitimate interest.* Legitimate interest is the one that enjoys legal protection, and in this case the interest pursued by the employer is a manifestly malicious one, which will greatly harm the interest of the employee concerned. The legally protected interest of the employee is to work in order to satisfy his economic and social needs, and the legally unfounded interest of the employee is not to give the employee the opportunity to satisfy that need
- ✓ *Bad faith.* The antipode to good faith, a fundamental principle guiding the exercise of a subjective right, bad faith manifests itself in an incorrect attitude, contrary to the rules of ethics and social coexistence;
- ✓ *Exercise of the right contrary to its purpose.* The right to conclude individual employment contracts is established with the primary objective of regulating the legal aspects of the individual employment relationship between its two subjects—the employee and the employer.

In addressing instances of the employer's potentially abusive exercise of rights related to the execution, modification and termination of individual employment contracts, it is essential to categorize such situations by examining the various clauses embedded within the content of these contracts. This typology of clauses plays a pivotal role in identifying and understanding the nuances surrounding the employer's actions, ensuring a comprehensive evaluation of the contractual framework. By delineating specific provisions within the individual employment contract, we can more effectively assess and address instances where the employer's conduct may be deemed inappropriate or exceeding reasonable bounds.

It is widely acknowledged that clauses in an individual employment contract can be categorized into two main types: general clauses, which are standard for all individual employment contracts, and specific clauses, which are unique to certain employment agreements. As stipulated in Article 58, paragraph (1) of the Labour Code of the Republic of Moldova, individual

employment contracts are required to be executed in written form, with their content shaped by mutual agreement between the parties. Additionally, Article 49 of the Labour Code mandates the inclusion of specific clauses exhaustively listed by the legislator. Moreover, the contract may encompass additional provisions that align with existing legislation, as long as they do not violate the law.

However, it's important to note that the freedom of parties to incorporate these clauses into the individual employment contract is not absolute, but it is constrained by the provisions outlined in Article 46(8) of the Labour Code of the Republic of Moldova, which aims to align contractual terms with ethical and moral standards while ensuring compliance with public policy[32]. In essence, while parties have leeway in determining the content of their employment contracts, they are subject to limitations that prevent the inclusion of clauses conflicting with ethical principles, moral standards, or public policy considerations.

Specific clauses include those provided for in Article 51 of the Labour Code of the Republic of Moldova regarding: mobility clause, confidentiality clause, non-competition clause and clauses relating to compensation for transport costs, compensation for communal services, provision of accommodation. The mobility clause established according to the provisions of Article 52 of the Labour Code of the Republic of Moldova allows the employer to dispose of an activity that does not imply a permanent job within the same establishment. Therefore, in compliance with the requirements imposed by the legislator, the contractual parties are free to negotiate the insertion of such a clause in the content of the individual employment contract, in exchange for a payment in cash or in kind. However, there are situations where the employer abuses the rights resulting from the mobility clause. Romanian doctrine[33] considers that we are in the presence of abuse of right when the employer obliges the employee either to carry out work obligations in an area where it is impossible for the employee to travel due to the lack of public transport infrastructure or where the place of residence is a long distance away and the employee is notified of the need to travel too late to arrive on time.

Another specific clause that can be included in the content of the Individual Employment Contract is the non-competition clause[34]. A possible abusive exercise of the employer's right to insert such a clause in the content of the individual employment contract would arise from the fact that employers often regard them as a method of allowing them to prohibit the employee, at their

[32] Art. 46, alin. (8) statuează: Este interzisă încheierea unui contract individual de muncă în scopul prestării unei munci sau a unei activităţi ilicite ori imorale.
[33] ȘTEFĂNESCU, I. T., *op.cit.*, p. 53
[34] Art. 53[1] Codul muncii al Republicii Moldova: nr.154 din 28.03.2003. In: *Monitorul Oficial al Republicii Moldova*. 2003, nr. 159-162.

discretion, from performing similar work for a competing establishment for a certain period of time after the termination of the employment contract.

The exercise of this right, however, must avoid any abusive practices. Therefore, when incorporating non-compete clauses, careful consideration should be given to the unique characteristics of the economic sector to which these clauses apply. For instance, in highly competitive sectors like Information and Communication Technology (ICT), where there is fierce competition for market dominance and an acute shortage of highly qualified specialists, it becomes imperative to tailor the temporal restrictions imposed by non-compete clauses to the specific activities involved.

Recognizing the dynamic nature of certain industries, it is essential to acknowledge that the duration of non-compete clauses may vary based on the distinct features of the sector. Simultaneously, imposing an expansive geographical limitation covering an entire country or continent is deemed impractical and overly restrictive. Restricting the right to work on such a broad scale is not feasible. Therefore, a more judicious approach involves constraining the geographical scope to the locality in which the employer operates. This approach aligns with the practical realities of the business environment while striking a balance between protecting legitimate business interests and ensuring individuals' rights to work are not unduly curtailed.

Another recommendation is not to use a standard model non-competition clause, as the limitations imposed by a model may not apply equally to all employees. The risk for an employer in this situation is that the clause is unenforceable because it is unreasonable and/or even unfair and can easily be diminished or voided in court. The argument in this case is that the non-compete clause, being a specific clause, is negotiated on a case-by-case basis and differs in its limitations according to the time period, the geographical area and the category of employees it covers.

We estimate that **this clause has the role of compensating the exercise of an obligation of loyalty and fidelity towards the former employer (obligations not regulated in the Labour Code of the RM), but which are found in certain Codifications of professional ethics and deontology specific to certain fields of activity. Moreover, the employee is reimbursed for any damage to his financial situation caused by a temporary or territorial inability to take up employment, through the payment of this compensation.**

We note that both in the case of recall from annual leave and in the case of delegation for work purposes or secondment, the employer may abuse the rights conferred on him by the legislator by diverting them from their intrinsic purpose.

The most eloquent example of abusive exercise of the employer's rights is the termination of the individual employment contract, whether it is terminated at the employee's initiative or for

one of the reasons for dismissal. The legal framework governing contract termination serves as a cornerstone for employment stability, ensuring protection for the rights of both parties involved. Governed by the principle of legality, the legislator meticulously regulates the grounds, circumstances, reasons, and procedures leading to contract termination, as well as the subsequent monitoring of compliance with legal provisions and the accountability of the parties. Labor legislation explicitly outlines and restricts the situations in which employers can dismiss employees, establishing stringent formalities to prevent potential abuses and maintain the principle of employment stability. This approach underscores a commitment to fair and lawful terminations, promoting a balanced and secure employment environment for both employers and employees.

However, we found that the provisions of Art. 82^1 of the Labour Code of the Republic of Moldova, which states that the written agreement of the parties may serve as a basis for the termination of the individual employment contract, cannot create a situation of conflict, as the parties are in a position of equality, both parties having expressed their written agreement on the termination of the employment relationship. Similarly, in situations where the individual employment contract is terminated in circumstances beyond the control of the parties, there are situations where the employer could not abuse its rights. These circumstances are listed exhaustively by the legislator in Articles 82, 305 and 310 of the Labour Code of the Republic of Moldova, as they are independent of the will of the parties, so that the subjective element of abuse of right is missing.

While the termination of an individual employment contract at the initiative of the employee might initially appear free from the potential for an abusive exercise of employer rights, nuances exist. The employer he only takes note of the employee's request and follows the procedure and terms set out in Article 85 of the Labour Code of the Republic of Moldova. However, it is crucial to recognize that the employer still possesses the capacity to abuse their rights, potentially prompting the employee to resign and terminate the employment relationship.

The phenomenon of *constructive dismissal* –[35] of the common law system, which is a constructive dismissal disguised as a resignation is in fact an abuse of right by the employer. We identify such situations where an employee is forced to resign because the employer has created a hostile working environment which is not conducive to the performance of work. Since the resignation does not actually express the employee's intention and desire, it constitutes a disguised dismissal. The purpose of this is to avoid the procedure established in the case of dismissal and to

[35] Pentru detalii: Constructive Dismissal - Bullying and Harassment. In: *Employment law* [online]. [citat 23.02.2023]. Disponibil: https://www.rosendorff.com.au/constructive-dismissal/

reduce or totally waive the payment of certain guarantees due to the employee in the event of dismissal. Indeed, the jurisprudence in the United Kingdom of Great Britain and Northern Ireland[36] recognizes that various situations may constitute constructive dismissal. Constructive dismissal occurs when an employee resigns due to the employer's breach of contract, creating an untenable work environment. Some circumstances deemed as constructive dismissal include:

- demotion of the employee;
- change of work tasks or a shift in the nature of the work;
- change of working arrangements;
- reduction of salary or denied salary increases;
- change of workplace;
- changing the duration of rest leave, etc.

In most cases, abusive termination of the individual employment contract occurs by invoking one of the grounds for dismissal set out in Article 86(1). (1) of the Labour Code of the Republic of Moldova. Although the reason invoked appears to be legal, there is a contradiction between the factual and legal reasons underlying the dismissal, such that the decision to terminate the individual labor contract in connection with the dismissal of the employee is abusive.

Labour legislation expressly and restrictively provides for situations in which the employer may dismiss employees, establishing strict formalities for such situations, in order to avoid possible abuses and to achieve the principle of stability in employment. Furthermore, it should be noted that the list of grounds for dismissal of employees is indicative, the legislator establishing in letter z) of Art. 86, the possibility of dismissal for other reasons provided for by the Labour Code and other legislative acts. In the opinion of the authors Eduard Boisteanu and Nicolae Romandas, this situation may generate possible abuses on the part of the employer and it would be necessary to establish an express and limitative list of reasons for which the dismissal of the employee may be ordered[37].

Considering the particularities of abuse of right, its legal nature and the legal employment relationship, a clear distinction should be made between situations in which a subject of this relationship, violating the letter of the law, commits an unlawful act, and situations in which, exercising or not exercising a certain right, violates its spirit and commits an abuse of right. Thus, there can be no abuse of power, but we are in the situation of illegal acts when, for example: the employer terminates the individual employment contract without observing the notice period (in

[36] Idem, [online]. [citat 23.02.2023]. Available at: https://www.rosendorff.com.au/constructive-dismissal/
[37] BOIȘTEANU, E., ROMANDAȘ, N., *op.cit.*, p. 448

the case of Art. 86 (1) (c) - reduction in the number of staff or staff states in the unit) or proceeds to dismiss employees who are members of trade union in the cases stipulated in Art. 86 (1) (c). (1) lit. c), e) and g) without consulting the trade union of the establishment; the employee goes on unpaid leave without the employer's approval of the request; the employee does not come for work when he/she is called up for overtime work, according to Art. 104 para. (2) (b), for the performance of work necessary to remove situations that could endanger the proper functioning of water and electricity supply, sewage, postal, telecommunications and IT services, communication and public transport, fuel distribution facilities, of medical and sanitary units; other situations of violation of legal rules governing labour relations.

In examining instances of the abuse of right within collective labor relations, this study has specifically investigated potential manifestations outlined in **Section 3.3, Abusive exercise of the rights of employers (representatives of employers)** and respectively, in **Section 3.4. Abuse of the rights of the trade union/elected representatives of employees.**

We have determined that the abusive exercise of the right to collective negotiations by the employer is feasible within the legal framework of the Labour Code of the Republic of Moldova. Article 26 of the Code grants social partners the right to initiate and engage in collective negotiations, while Article 32 stipulates that, should no agreement be reached on certain provisions of the draft collective agreement within three months of negotiations, the parties are obligated to sign the contract only for the agreed-upon clauses. Simultaneously, they must draft minutes detailing existing divergences, subject to subsequent collective negotiations or resolution in accordance with prevailing legislation. These provisions suggest that the subjective right to participate in collective negotiations can be manipulated from its inherent purpose. In cases where the employer acts in bad faith, the negotiation process may not culminate in the signing of the collective employment contract—the ultimate objective of the negotiations. As articulated by author Eduard Boisteanu, "collective negotiation aims to achieve an agreement of will and not necessarily a victory, with both social partners feeling at the end that they have achieved the maximum possible of what they initially set out to achieve”[38]. This underscores the potential deviation of the negotiation process from its intended goal when conducted in bad faith by the employer.

We qualify as abusive the actions of the employer who, during the collective negotiation process, carries out a series of measures relating to:

[38] BOIȘTEANU, E. *Parteneriatul social în sfera muncii:* Monografie. Chișinău: CEP USM, 2014., *p.* 134

- elaboration of internal regulations on employee motivation mechanisms (these regulations contain clauses that would have been included in the collective labour agreement anyway, and the adoption of internal regulations prior to its signature aims at undermining the authority of the trade union/representatives of employees);
- initiating a "hidden re-branding strategy" for the unit, the aim of which is to optimise its costs and change its organizational structure, which will implicitly lead to staff cuts;
- investment in the material base of the unit, which in fact represents an improvement in working conditions. Even the idea of improving working conditions is a useful one, resulting from the employer's legal obligations in the field of occupational safety and health. The employer's actions are abusive because they are intended to put the representatives of the trade unions in an unfavourable situation, but since the trade unions are meant to represent the social and economic interests of the employees, this role is not fulfilled because the employees apparently benefit from various facilities and social protection mechanisms.

The termination of the collective labour agreement is also not expressly regulated by the Moldovan legislator, Art. 33 of the Labour Code of the Republic of Moldova stipulating only that upon expiry of the term of the collective labour agreement, it shall continue to produce its effects until a new contract is concluded or until the parties decide on its extension. However, it should be noted that it takes effect after expiry only if the parties have not decided to terminate the contract. In this respect, the employer's intention to terminate the collective labour agreement may be abusive, as it is intended to avoid paying the employees certain rights to which they are entitled even for a certain period (between the time of termination and the conclusion of a new collective labour agreement).

In terms of the abusive exercise of employee representatives' rights, we have also analyzed this from the perspective of the abusive exercise of the right of association. A form of abuse of the right of association was pointed out by the researcher Eduard Boisteanu[39]. According to para. (3) of Art. 8 of the Trade Unions Law, trade unions are founded voluntarily on the basis of common interests (profession, branch, etc.) and usually operate in enterprises, institutions and organizations, hereinafter referred to as units, regardless of the legal form of organization and type of ownership, departmental or branch affiliation. According to this researcher, the provisions of para. (3) of Art. 8 of the Trade Unions Law, in conjunction with Art. 1 of the same law (which defined the notion of primary trade union organization as a voluntary association of trade union

[39] BOIȘTEANU, E. , *op. cit.,* p,243

members on the basis of common interests, usually working in the same enterprise, in the same institution, in the same organization, regardless of the legal form of organization and type of ownership, departmental or branch affiliation) are "ambiguous and may lead to serious confusion"[40]. Furthermore, he notes that such "excessively permissive regulation may have negative consequences for the trade union movement"[41].

A possible abuse of right, we found in the context of the non-compliant exercise of the right to strike, which can be carried out from the intention to disrupt the work of the unit, contrary to the reason for which this right was established. We have described in this context situations in which French case law has held that the strike was abusive[42], such as rolling or "go-slow" strikes (occur when strikers reduce the efficiency of work by performing work operations at a slow pace, or when some employees stop work in succession so that the other employees are physically unable to work) or thrombosis strike (when it intervenes in a strategic place of the unit, stopping its activity).

The US legislator in the National Labor Relations Act[43] also considers as disloyal actions, which incite or encourage an employee to engage in a strike or to refuse to perform the obligations to which he is entitled in the course of his work, in such a way that the refusal or engagement to strike endangers the free movement of goods and services. Thus, that the US courts[44] considered that a "sit-down" strike, when employees simply stay in the factory and refuse to work, restricting the employer's right to property, is not protected by law.

Trade unions (as appropriate, the elected representatives of the employees), as social partners, have the possibility of abusively exercising not only their right of association and the right to strike, but also other subjective rights to which they are entitled, both at the time of the conclusion and termination of the collective labour agreement and during its execution, amendment and suspension.

It is important to note that the legislation of other countries contains express rules on the non-admissibility of abuse of right and the exercise in good faith of subjective rights conferred by the legislator on employee representatives. For example, the Labour Code of the Republic of Lithuania of 4 June 2002 states that "entities representing employees must carry out statutory

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[40] BOIȘTEANU, E., *op.cit.*, p. 142

[41] Idem, p. 143

[42] Cassation social du 04.07.1972, pourvoi no. 72-40203 [online]. In: *Bulletin civile des arrêts Cour de Cassation Sociale*. France, 1972, no. 483, p. 441 [citat 01.12.2022]. Disponibil: https://juricaf.org/arret/FRANCE-COURDECASSATION-19720704-7140593.

[43] *National Labor Relations Act (NLRA)* [online]: no. 29 U.S.C. §§ 151-169 of 05.07.1935 [citat 01.02.2023]. Available: https://www.nlrb.gov/guidance/key-reference-materials/national-labor-relations-act.

44 The Right to Strike. In: *National Labor Relations Act* [online]. New York, 1935, section 13 [citat 01.02.2023]. Disponibil: https://www.nlrb.gov/strikes

actions in such a way that the interests of employees are represented in labour relations and are in accordance with legal provisions and do not contravene the principle of good faith governing relations between the parties. If the limits of the mandate conferred to employee representatives are not set by the legislator, then they will be determined by the parties in the collective labour agreement"[45]. From the text of the mentioned law, it results that the entire collective labour relationship, starting with the stage of conclusion and ending with the stage of termination, must be governed by the principle of good faith and the inadmissibility of the intervention of abuse of right, a rule that we considered advisable in the Labour Code of the Republic of Moldova. We note that in collective labour relations, unlike in civil law, where, by virtue of the principle of contractual freedom, the parties are free to negotiate clauses whereby one party asserts an exaggerated interest in relation to the other party (with the exception of unfair competition clauses), the submission of exaggerated claims represents an abusive exercise of rights (e.g., the right to negotiate), prejudicing the interests of the other party and may lead to collective labour disputes.

In **Chapter 4,** entitled **LEGAL NATURE OF LIABILITY FOR ABUSE OF RIGHT IN THE FRAMEWORK OF EMPLOYMENT RELATIONSHIPS,** the legal form and nature of liability for abuse of law in the framework of legal employment relationships, its elements, as well as the applicable sanctions for abuse of right are investigated. Moreover, the characteristic features of liability for abuse of right in legal employment relationships were identified. At the same time, we concluded that regardless of the subject of the employment relationship, abuse of righ in employment relationships can only be committed by intentional actions, when the holder of the subjective right is aware of the abusive nature of his act, foresees its consequences and either intends them to occur or does not intend them, but accepts the possibility of their occurrence. The lack of legitimate interest is specific to liability for abuse of right in employment relationships.

The fundamental challenge in establishing penalties for the abuse of right stems from the circumstance that, despite the potential for material and/or non-material harm resulting from such abuse or the imminent risk thereof, the actions or inactions involved may not be deemed wrongful acts in the traditional sense, as defined by the court. Consequently, legal liability may not be invoked. Furthermore, the mere denial of legal protection in exercising a subjective right does not suffice to rectify the infringements upon the rights and interests of the parties involved in the legal employment relationship. In essence, the difficulty lies in addressing situations where harm may

[45] *Labour Code Lietuvos Respublikos* [online]: by Law no. IX-926 of 4 June 2002 [citat 23.11.2021]. Disponibil: http://www3.lrs.lt/pls/inter2/dokpaieska.showdoc_e?p_id=191770

occur due to abuse of right, yet traditional legal remedies for wrongful acts may not be directly applicable.

It is worth mentioning that as a result of the intervention of abuse of right, moral damage may also occur if one of the parties has been caused psychological suffering. This statement is argued by the fact that labour law protects both patrimonial and non-patrimonial rights, namely the right to dignity at work. The Labour Code of the Republic of Moldova establishes that dignity at work is "a comfortable psycho-emotional climate in labour relations which excludes any form of verbal or non-verbal behaviour on the part of the employer or other employees which may harm the moral and psychological integrity of the employee". Thus, employees are obliged to respect the right to dignity at work of other employees, according to para. (2), letter d) Art.9 of the Labour Code of the Republic of Moldova. Raluca Dumitriu, a researcher from Romania, considers that dignity at work means "prohibition of any form of discrimination, ensuring equal treatment, prohibition of moral or psychological harassment, prohibition of sexual harassment; the possibility for the employee to request and obtain moral damages for the impairment of his non-pecuniary rights".[46]

In practical terms, numerous situations arise where actions, although seemingly in full compliance with legal norms, amount to an abusive exercise of subjective rights. Instances such as relocating an employee to a remote and challenging-to-reach location or implementing an opaque system of remuneration while categorizing salary details as personal data fall into this category. While these actions may not necessarily lead to tangible material inconveniences for the employee, they can have adverse effects on their psychological and moral well-being. In such cases, the affected employee retains the option to seek recourse through the appropriate legal channels, typically by appealing to a competent court. The objective is to establish the employer's liability for the abusive exercise of rights and pursue compensation for any moral damages incurred. This legal avenue serves to address situations where the impact is more psychological and moral rather than strictly material, allowing individuals to seek redress for the harm caused by such seemingly legal but abusive practices.

GENERAL CONCLUSIONS AND RECOMMENDATIONS

The general conclusions underscore the prevalence of the abuse of right within the framework of legal employment relationships, encompassing both individual and collective employment contexts. Abuse of right manifests when the subjective rights granted to an individual

[46] DIMITRIU, R. Respectul vieții private și al demnității la locul de muncă. In: *Revista Română de Dreptul muncii*. 2011, nr. 7, pp. 43-45. ISSN 2286-0606

are wielded in contradiction to their intended purpose, in violation of the principle of good faith, and against public policy and morality. This conduct leads to detriment to the interests of other participants in the relationship. In essence, the phenomenon of abuse of right in employment relationships is characterized by actions that deviate from the established purpose of conferred rights, breaching principles of good faith and causing harm to the broader interests of those involved in the relationship.

As a result of the complex investigation carried out, we draw the following **general conclusions:**

1) In the context of contemporary society, the concept of abuse of right has evolved into a much more complex concept than that described by the proponents of the theory bearing the same name, as reflected in Chapter I. Beyond the malicious intent traditionally associated with this theory, contemporary perspectives recognize that the basis for addressing abuse of right extends beyond intentional malice. It becomes imperative to sanction such abuse to maintain a delicate equilibrium, ensuring fairness in light of the harm inflicted upon the victim by the excessive exercise of rights. In this regard, good faith emerges as a pivotal criterion guiding the court's assessment of the abuser's conduct. The severity of the abuse of right is primarily evaluated through the injurious nature of the damage suffered by the victim, emphasizing the critical role of good faith in determining the gravity of such misconduct.
2) Moldovan legislator adopts the mixed theory of abuse, accepting that both subjective and objective criteria are related to its legal nature, considering abuse of right as a form of violation of good faith. Art. 13 of the Civil Code of the Republic of Moldova explicitly prohibits the abuse of right, stipulating that no subjective right may be predominantly exercised with the intention of causing harm or detriment to another person. Likewise, Art. 56, para. 3 of the Code of Civil Procedure of the Republic of Moldova mandates participants in civil proceedings to wield their procedural rights in good faith. The legislature characterizes the abusive exercise or misuse of these rights as a manifestation of bad faith, encompassing elements of guilt, fraud, deceit, and serious culpability;
3) The fundamental prerequisite for the occurrence of abuse of right lies in the existence of a subjective right, and within the legal employment relationship, the abuse of right transpires when the involved party exercises their subjective rights in bad faith, devoid of a lawful purpose. In essence, the misuse or malevolent exercise of these rights within the context of the legal employment relationship constitutes an act of abuse of right;
4) The principle of good faith should become integral part of the normative framework of labor law, asserting its significance in employment relationships. Within this context,

good faith imposes a set of rights and obligations on the parties involved, curbing the absolute autonomy of will and the exercise of subjective rights. Consequently, good faith emerges as a foundational principle influencing all aspects of labor law, compelling the participants in employment relationships to conduct themselves in accordance with its rationale. Notably, the act of exercising a subjective right in bad faith is identified as a form of abusing rights. In light of these considerations, we propose a series of amendments to certain legislative acts to further align the legal framework with the principles of good faith in labor relations (Labour Code, Education Code and the Law on Civil Service and the Status of Civil Servants No 158-XVI of 4 July 2008);

5) Subordinate work, inherent to the employment relationship, establishes an environment conducive to the potential bad-faith exercise of subjective rights by the stronger party in this relationship - the employer. Nevertheless, our examination has brought to light instances where the employee, too, engages in an abusive exercise of the rights conferred upon them throughout the phases of entering into, executing, modifying, and terminating employment relationships. This underscores the complexity of the abuse of right phenomenon within the employment context, where both parties may exhibit behaviors deviating from the intended purpose of their respective rights;
6) In the context of collective labour relations, exaggerated claims by the parties constitute an abusive exercise of rights (e.g., the right to negotiate), which may harm the interests of the other party and may lead to collective labour disputes;
7) The nature of the liability for the abusive exercise of the employment relationship will always depend on the nature of the right in question. Thus, this exercise could entail both disciplinary and financial liability, as well as the accumulation of both liabilities;
8) Legal liability for the abusive exercise of a right is a legal relationship of coercion, which consists in the prerogative of the State to claim liability from a person who exercises a subjective right in bad faith and contrary to the mission conferred by the legislator of this right, the guilty person being liable to punishment for such actions;
9) The theoretical significance and practical relevance of the issues explored and clarified in this study stem from the identification of situations wherein the holder of a subjective right has the conditions for potentially engaging in an abusive exercise of that right. This recognition contributes to a deeper understanding of the complexities surrounding the abuse of right, providing insights that have implications for both theoretical frameworks and real-world applications in various contexts.

10) Equally noteworthy is the discovery, made in the course of our research, that, in addition to doctrinal insights, there exist rights within the employment relationship that are not susceptible to abuse. This category encompasses what is referred to as potestative rights, a concept acknowledged by our doctrine and also recognized in the legal systems of Germany and Italy. The discretionary nature of these rights, left by the legislator to the exclusive discretion of the holder, their lack of an internal limit on exercise, and their association with certain pre-existing legal situations lead us to the conclusion that the question of abuse of right does not arise in the context of potestative rights.

Although these general conclusions are mainly of a theoretical nature, we consider that they allow us to formulate certain recommendations from a theoretical and practical point of view, corresponding to the purpose and objectives formulated at the beginning of this study.

From ***a theoretical perspective***, based on the conducted research and a review of both domestic and international doctrines and legislations, we would like to put forth the following **general proposals:**

1. The concept of good faith, which will govern social relations within the legal employment relationship, should be formally incorporated into the normative content of labor law. This guiding principle should extend its influence to the rules governing the principles of social partnership. Despite its inclusion in the Civil Code, it is essential to expressly integrate this principle into the framework of labor law and other legislation that oversees employment relationships, especially for specific categories of employees such as civil servants and education staff. Such incorporation will contribute to the comprehensive realization of the functions of this guiding principle in legal employment relationships, including information dissemination, rule integration, limitation, and redress of the exercise of rights;
2. It is recommended to establish clear conditions for the exercise of subjective rights by participants in the legal employment relationship, incorporating these provisions into the Labour Code of the Republic of Moldova. We consider that proactive step is anticipated to mitigate instances of abusive exercise of subjective rights within this relationship. The generally accepted idea that the employee is the vulnerable part of the employment relationship has created the premises for the abusive exercise of subjective rights, including by the legislator's failure to integrate these principles of exercising subjective rights into the Labour Code. By implementing these proposals, a mechanism can be established to work towards achieving a key objective: minimizing the impact

on social relations governing the employment relationship resulting from the abusive exercise of rights by the parties involved in this relationship;

3. We further recommend adopting the following definition for the concept of abuse of right within the context of legal employment relationships: *"The exercise by the subjects within the legal employment relationship of subjective employment and related rights, contrary to the intended purpose for which they were recognized, in bad faith, with the intent to harm the interests of another party".* This definition is designed to prevent the misappropriation of rights, ensuring that they are not utilized in a manner inconsistent with their inherent purpose. It aims to contribute to the establishment of a legal employment relationship grounded in principles such as honesty, fairness, loyalty, and other ethical considerations;
4. We emphasize that simply defining the concept of "abuse of right" and incorporating provisions in the Labour Code to delineate the limits of the exercise of subjective rights is not sufficient. It is our contention that it is crucial to legally stipulate in the Labour Code of the Republic of Moldova the liability of an individual who has exercised a subjective right in bad faith, disregarding the economic and social purpose for which it was granted. This should include the possibility of imposing sanctions for such actions, in accordance with the prevailing legislation

From **a practical perspective,** we assertively propose the following **amendments to the legal framework:**

1. *Ferenda Law* proposals for amending and supplementing the Labour Code of the Republic of Moldova. Taking into account the fact that this is the "leading" law in the field, it is necessary to make the following amendments and additions to proactively address the prevention of rights abuse and to explicitly incorporate one of the fundamental principles of law - good faith - into its content. Particularly, we propose to complete the Labour Code of the Republic of Moldova with a new chapter, namely ***Chapter II[1]***, entitled **THE EXERCISE AND PROTECTION OF LABOUR RIGHTS.** The proposals are in line with the rules stipulated in Arts. 10, 11 and 13 of the Civil Code of the Republic of Moldova. Moreover, we propose the introduction in the Labour Code of provisions aimed at strengthening the principles of social partnership, namely the introduction in Art. 17(g) of the Labour Code of provisions on the conduct of social partnership under the principle of good faith;
2. *Ferenda Law* proposals for amending and supplementing the Education Code of the Republic of Moldova No. 152 of 17 July 2014, published on 24 October 2014 in the

Official Monitor No. 319-324. Analysing the institution of legal liability through the lens of the responsibility notion as a form of attitude and awareness of the actions that a subject undertakes and their impact on the social relations protected by legal norms, we observe that, in practice, it is the only normative act that incorporates provisions specifically addressing responsibility. Art. 107 of the Education Code of the Republic of Moldova[47] establishes the principle of public liability of the rector of the higher education institution and the president of the Institutional Strategic Development Board. The change of higher education paradigm from a classical university, eminently dependent on state budget funds, to a modern university with financial autonomy, focused on the quality of the whole activity, imposes on their managers a higher degree of responsibility in the context of ensuring the reliability and sustainability of management. This concept of public liability implies, according to us, the adoption by the managers of the higher education institution of an attitude towards its actions, of a behaviour, based on a set of values, whose consequences are desirable both for them and for the community. In this context, we propose rewording para. (2) of Art. 107 of the Education Code of the Republic of Moldova, entitled ***Public Liability,*** as follows: ***"The Rector and the President of the Institutional Strategic Development Board act in good faith to ensure compliance with obligations arising from the principle of public liability".*** The interest for the content of this normative act results also from the professional aspect, as well as from the fact that it regulates the employment relations of the employees of a sector, whose share is the highest in the context of the labour market of the Republic of Moldova. In the context of this proposal, we argue that good faith is applicable both to the context of assuming a managerial act, carried out in good faith, in terms of responsibility for the impact of decisions on society, and to the formation of an institutional culture, based on ethical principles and professional ethics[48];

[47] Codul educației al Republicii Moldova: nr. 152 din 17.07.2014. In: *Monitorul Oficial al Republicii Moldova*. 2014, nr. 319-324

[48] Pentru detalii cu privire la principiul responsabilității publice și modalitățile de realizare ale acestuia în instituțiile de învățământ superior a se vedea: COTELNIC, A., NICULIȚA, A., TODOS, P., TURCAN, R., BUGAIAN, L., **POJAR, D**. Looking for (Re)Defining University Autonomy. In: *The USV Annals of Economics and Public Administration*. 2015, vol. 15, no. 1. ISSN 2285-3332, și în: BUGAIAN, L., COTELNIC, A., NICULIȚA, A., **POJAR, D**., TODOS, P., TURCAN, R. University-Staff Tensions in Implementing Human Resource Autonomy in practice: The Example of Moldova. In: TURCAN, R. V., REILLY, J. E., BUGAIAN, L., eds. (Re)Discovering University Autonomy: The Global Market Paradox of Stakeholder and Educational Values in Higher Education. New York: Palgrave McMillan, 2016, chapter 6, pp. 87-95. ISBN 978-1-349-55212-2

3. Another *Ferenda Law* proposal deals with the amendment of the Law on the civil service and the status of civil servants No 158-XVI of 4 July 2008, published on 23 December 2008 in the Official Monitor No 230-232. The content of this law includes rules on the deontology of the civil service. Thus, in order to insert the exercise of the subjective rights of the civil servant in a framework in which several subjects coexist and in which a well-defined moral concept prevails, we propose to add the following para. (1) of Art. 22, entitled ***General obligations of the civil servant,*** with letter b^1) with the following content: ***"(1) The civil servant has the following general obligations: b^1) to be guided by the principle of good faith in its activity".*** Introducing the principle of good faith as a guiding rule of conduct for public position holders serves the purpose of cultivating a behavior among public servants grounded in values such as honesty, fairness, loyalty, and more. These values align with the individual's role as a representative of a public authority and, by extension, the state. This incorporation aims to set standards for ethical conduct, emphasizing the responsibilities associated with holding a public position.

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ANNEXES

Annex No. 1 Proposal to amend and supplement the Labour Code of the RM

Draft

Republic of Moldova

PARLIAMENT

LAW No.___

dated_____

for amending and supplementing the Labour Code No.154 dated March 28, 2003

The Parliament adopts this organic law.

Art. I. –The Labour Code of the Republic of Moldova No. 154/2003 (Official Monitor of the Republic of Moldova, 2003, No. 159-162, Art. 648), as amended subsequently, undergoes the following modifications:

1. Article 5 is supplemented as follows:

   Letter b)[1] with the following content: b)[1] principle of good faith

   Para. (2) with the following content: The State shall support the realization of the right to work. In exceptional cases, the right to work and other rights connected with it may be restricted only by law or by a court order when such restrictions are necessary to protect public policy, morals, as well as health, life, property, rights, and legitimate interests of others.

2. The Code is supplemented by a new Chapter - Chapter II[1] with the following content:

Chapter II[1] **EXERCISE AND PROTECTION OF LABOUR RIGHTS**

Article 14[1]. Basis for the Establishment of Employment Rights and Obligations

Employment rights and obligations may occur, undergo changes or terminate through the following means:

(a) by the provisions of this Code and other applicable laws, individual employment contracts, collective agreements, and other acts, which, while not mandated by law, do not violate legal provisions.

2) through court decisions;

3) through administrative acts carrying legal implications in matters of employment

4) as a consequence of inflicted harm;

5) as a result of legal actions of natural and legal persons and events to which the law attributes the occurrence of legal effects in employment and related relationships.

Article 14^2 Exercise of employment rights and fulfilment of employment obligations

1. Employers, employees, and their representatives are required to act in good faith while exercising their rights and fulfilling their obligations. Any abuse of rights by either party is strictly prohibited.

2. The exercise of employment rights and the fulfilment of employment obligations must not infringe upon the rights and interests of other individuals, which are protected by law.

Article $14^{3.}$ Protection of labour rights

(1) Employment rights are protected by law unless they are exercised contrary to their intended purpose, the public interest, good faith, public policy, or morality.

(2) Employment rights are protected by the court or any other dispute resolution body according to the procedure established by law and in one of the following ways:

1) by recognising the respective rights;

2) by restoring the situation existing before the infringement and preventing the acts infringing the right from being committed;

3) by ordering fulfilment of the obligation in kind;

4) by termination or modification of the legal relationship;

5) by recovering from the person who has infringed the right material or non-material damage or, in the cases provided for by law, also penalties or default interest;

6) in other ways established by law.

3. Exceptionally, only the courts have the authority to protect employment rights in accordance with the law. This includes the power to declare null and void acts issued by public authorities or institutions if such acts are found to be in contradiction with the established laws.

4. Labour rights are protected by trade unions/employee representatives according to the procedure stipulated by the laws regulating their activity.

5. In situations explicitly defined by labour law, employment rights are protected by the regulations governing labour jurisdiction.

3. Amendment to Article 17, Letter g):

g) good faith and mutual trust between the parties;

4. Article 53^1 to be supplemented by para. $(1)^1$ with the following provisions:

Article 53^1. Non-compete clause

$(1)^1$ The respective clause is not mandatory if its purpose is not to protect the legitimate business interests of the employer or if, having regard to the geographical area, time and purpose of the prohibition related to the legitimate business interests of the employer, the clause disproportionately restricts the employee's right to work.

5. The Code is supplemented by a new article - Article 56^1 with the following provisions:

Article 56^1. Specific circumstances preceding the conclusion of the individual employment contract

(1) Specific circumstances preceding the conclusion of the individual employment contract are prerequisites for entering into an individual employment contract for certain positions. These circumstances include: competition, election to the position, selection test, and interview.

(2) The competition is a mandatory method for assessing the skills and knowledge of individuals recruited and promoted, especially within public administration bodies and budgetary units. The selection of the candidate for the individual employment contract is determined by ranking, based on the evaluation of the candidate's performance in the competition.

(3) The competition is conducted in accordance with the framework regulations approved by the Government or internal regulations of the establishments, which must include, at a minimum, provisions on:

a) Procedure for the organization and conduct of the competition for the recruitment of candidates to the vacant position;

b) Conditions for participation in the competition;

c) Methods of formation, composition (members), and activities of the competition committee;

d) Procedures for contesting the results of the competition.

(4) Election to the position is a distinct requirement of employment, involving the selection of the most competitive or suitable candidate to fill a specific vacancy based on predetermined criteria.

(5) Elective positions are established through regulatory acts governing the activities of a particular type of establishment, as well as by institutional regulations within those establishments.

(6) Practical assessment is a distinct requirement for employment and involves evaluating the practical skills a person possesses, necessary for carrying out work activities, to determine whether the individual meets the occupational requirements.

(7) The duration of the practical assessment is a maximum of one working day, and the criteria for evaluating candidates are stipulated in regulations specific to the occupational field.

(8) The practical assessment can be implemented either as a distinct job requirement or as one of the steps within other specific job requirements.

(9) The interview is a specific employment requirement, which involves testing the skills, aptitudes and motivation of candidates, through a conversational format.

(10) The interview is organised according to the interview plan developed by the employer, which is based on the assessment criteria specified in the regulations governing the activities of a particular type of establishment and the institutional regulations of those establishments.

(11) The decision to employ or not to employ following the interview will be communicated to the candidate within a reasonable time, but no later than 10 working days from the date of interview.

(12) The categories of positions to which the specific circumstances described above may apply are determined in accordance with the provisions of the present Code and other relevant normative acts.

6. To amend para. (1) of Article 329 in the following wording:

Article 329 Compensation for material and non-material damage caused to the employee

(1) The employer is obligated to provide full compensation for material and non-material damage incurred by the employee in connection with the performance of work obligations. This obligation arises in cases of workplace discrimination, unlawful deprivation of the opportunity to work, and the infliction of moral and psychological suffering, unless otherwise stipulated by this Code or other relevant normative acts.