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E-MAIL OR MESSENGER? – DILEMMAS OF ELECTRONIC COMMUNICATION IN LABOUR LAW*

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Abstract: With the entry into force of the new labour law rules, responses to new life situations, such as the possibility of electronic communication, have come to the fore. Under certain conditions, the legislator treats the electronic document in the same way as paper documents. Our everyday relationships are transforming, becoming more and more digital. As a result, employees are increasingly using digital solutions to make their legal disclaimers. These life situations raise a lot of questions. Some of the questions have not yet been answered by the legislator. In the case of legal disclaimers made in electronic form, the scope of subjects and other conditions of mailing are often not clarified either. It would be necessary for the legislator to respond to these issues, as even in the current pandemic situation, many workers are trapped in the online space, which will result in the more frequent use of digital solutions. In this study, we would like to present the current regulations and make suggestions for rethinking.

Keywords: *legal disclaimer, electronic document, employment, invalidity*

1. INTRODUCTION

In labour law, we can talk about three basic methods of the communication of disclaimers. According to Article 24(1) of Act I of 2012 on the Labour Code (hereinafter LC), there are three basic methods of the communication of disclaimers. *Personal communication* of the disclaimers seems to be one of the simplest solutions. In this case, the communicator and the receiver are in the same place in space and time. The communication itself can be only *verbal*, but in most cases, it is the handover of a *written* disclaimer of the employee or the employer. *Communication by post* is a bit more complicated method. In this case, using (rebuttable) presumptions is also necessary in certain cases if the addressee (knowing or

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suspecting the content of the disclaimer) refuses to accept it. Although, technical development has brought the acceptance of a third communication form, *communication by using an electronic document.* But what is an electronic document? The act does not list in detail the types of electronic documents that are considered to be written. Any electronic communication form can be considered if it meets the above-mentioned conditions (such as SMS, e-mail, a blog entry, a comment on a social website, etc.) (Hrecska et al., 2015).

So, the LC does not record the definition of a concrete electronic document, but it regulates the conditions that an electronic document should meet to connect to the legal consequence of literacy. According to point a) of Article 22(2) of the LC, *the legal disclaimer is written if its communication is electronically suitable for the unchanged recall of the information contained in the legal disclaimer and the identification of the declarant and the time of the declaration.* Regarding this, a wide range of communication channels are open.

The legislator explains the above-mentioned criteria among the formal constraints, in case of which it defines in the regulation in an implicit way that not the form is what determines the electronic document, but its content and its ability to know in function as much as the written communication form. That is why the electronic document, which can perform this function minimally by content as written communication, is accepted as equal with written communication by the legislator. The situation is quite complex from the aspect that the rules helping the interpretation included in the regarding parts of the LC rather inhibit the effective application of the rules. (Kártyás, Répáczki and Takács, 2016, p. 36).

It is important to highlight that the general definition of electronic documents cannot be defined. Earlier, Act XXXV of 2001 on Electronic Signatures (hereinafter: ESA) included a definition (point 12, Art 2 ESA) and type sign. SMS, chat, images, and several other digital formats could be involved in the conceptual range of electronic documents defined in the ESA.[1] In contrast with the ESA, *Act CCXXII of 2015 on the general rules on electronic administration and trust services* (hereinafter: E-administration act) does not have an exact conceptual basis.

2. VALIDITY OF ELECTRONIC DOCUMENTS IN LABOUR LAW

In the labour law frame system, we are talking about simple electronic documents fitting in the earlier conceptual range of the ESA. According to point 12 of §2 of the ESA, an electronic document is a data collection interpretable by an electronic device. Following the amendment of the ESA in 2004, even the electronic signature is not a requirement. If we look at the basic traits of labour relation, we cannot step over the frames of a simple electronic document. The employee, as the person in the position of the more vulnerable party, often does not have either the technical

[1] *Az elektronikus dokumentum körüli dilemmák a munkajogban*. Available at: https://szakszervezetek.hu/dokumentumok/munkajog/7198-az-elektronikus-dokumentum-koruli-dilemmak-a-munkajogban (Accessed: 6 November 2020).

conditions or knowledge to create electronic documents signed by a qualified electronic signature. Electronic communication is typically, but not exclusively, used by employers.

In connection with electronic communication, it should be highlighted that its simplicity means an advantage and a disadvantage at the same time. It can be easily created and managed, but that is why it is so easy to be modified and counterfeit as well. Applying them can often suggest a kind of stronger trust between the parties as well. Electronic communication is often a kind of complementary communication: the party declaring in this way often makes his/her statement on a paper as well after or during the time of the electronic communication. Although, the LC does not require this duality, as it accepts electronic communication to be equal to personal or postal communication.

Currently, electronic communication is not widely as spread in economic labour law as it is in public administration. In the case of civil servants, the communication on their public service legal relationship is performed via the Customer Portal. Article 71(11) of *Act CXXV of 2018 on government administration* (hereinafter GA) defines stricter conditions than the LC. According to the GA, *the part of the instrument of appointment and the amendment thereto, the declaration of termination, the notice of termination of the conflict of interest, and the order for payment shall be issued electronically by the employer exercising at least an enhanced electronic signature.* (Bankó, 2019, p. 176; Petrovics, 2015, p. 69)

However, in the economic labour law examined more deeply by us, the electronic signature with enhanced safety is not a requirement even from the employer. But it is worth examining how the criteria of the format and content are mixed in this regulation. A part of the uncertainties related to the electronic document also connects to this issue – currently, content defines the format. The legislator does not limit the range of the electronic documents whose recognition would be exclusive. On the one hand, this is a logical decision, as it has made the applicability of electronic documents independent of technology-neutral. But its advantage is also its disadvantage. In social terms, if there is a situation when everything is allowed, its value is even unintentionally questioned. We can meet this phenomenon in the case of electronic communication as well. As this communication can be performed in any way and there is not a determined format, the uncertainty and distrust related to its application are also great. The legislator interprets the definition of formal restraint in a completely different way in this case. Accordingly, those automatisms that are realized in the case of a paper-based document at the check of formal restraint do not work. The formal validity of electronic documents will be known only after the examination of their content. Accordingly, we can talk about a *consolidated invalidity situation* in the case of electronic document. It is consolidated since if the electronic document is created with not the appropriate data content, we cannot talk about its formal validity as well. So, these two forms of invalidity should be examined parallel in the case of electronic documents. If the content is inappropriate, the format is it as well. In this case, the parties should act with increased attention.

Such an examination of validity has often been left to the courts. Nevertheless, case law is also not completely unified, as the judgment of digital and electronic communication forms is not identical in front of certain courts.

3. THE ISSUE OF VALIDITY IN THE MIRROR OF A JUDICIAL DECISION

The fact that the issue examined in the study is not only hypothetical in nature is also well-shown by the judgment No. Mfv.I.10.644/2013/9 of the Curia. In the underlying case, the parties recorded in six points of the labour contract made by them that their ways of communication in during working hours are MSN messenger, email, and phone. The MSN program was an internet-based immediately working messenger service by which the parties could chat with each other in real-time. We can see in the conversations had via this program whether the other party has read our sent message or not, and the whole text of the conversations is traceable, and can be recalled later as well.

The defendant communicated the extraordinary termination for the claimant on the morning of 25 May 2010 via MSN in the way that he scanned the written and properly signed termination document and sent it to the claimant's MSN mailbox in JPG format. After this, the person exercising the employer's authority asked the claimant in an SMS to use the MSN program. The claimant entered the MSN program, then he used the program as a communication platform to declare for the defendant in a written form that he received the termination sent in JPG format, and he could open and read it. The claimant accepted the extraordinary termination and asked the defendant only to pay for the holidays for him. The basic question is whether an image file sent in a chat message is suitable to be considered electronic communication. If so, did the communication enter into force?

The above-mentioned questions should be examined in the light that the claimant later argued the validity of the communication. The claimant did not consider the extraordinary termination sent by the employer to be regular, because, according to him, no official documents related to a labour relation can be delivered without an electronic signature and via Internet. So, he terminated his labour relation by extraordinary termination on the same day, 25 May 2010. The question is: can any kind of electronic signature be a requirement on the electronic document in case of labour relations? The LC does not mention this, but Article 20(5) of the Act CXCIX of 2011 on civil servants says that a civil service legal relation can be terminated in the form of an electronic document communicated via the Customer Portal as well.

It can also be seen from the judgment that it was not argued in the lawsuit whether the employers' extraordinary terminations sent by post or MSN are equal or not. Based on this, the court found that the employer terminated the labour relation by extraordinary termination on 25 May 2010. The extraordinary termination of the employment had been written properly before its transmission via MSN, and it had been digitalized by scanning by the defendant. During the digitalization process, the reading head of the scanner read the information from the paper line by line and created its digital version faithful to the content that was sent to the claimant in JPG

(image) format by the defendant. Based on the judging exercise, because of its similarity to the telegram and telegraph, the legal disclaimer sent in JPG format via the MSN program should be considered as written as well. So, the defendant created the original paper-based version of the document and digitalized it. Because of its special function, the scanner took a photo of the document by a special technique. The verdict does not mention the issue that what should be done in the case of electronic communication forms where the document does not have a paper-based version as well. In our opinion, the analogy defined in the verdict can be a guideline only in cases where the paper-based version has also been made. In case of electronic communication which exceeds this, a newer, moreover, independent legal basis would be necessary. But the electronic documents should be accepted in their own right for this, and an own system of the criteria of invalidity should be defined. Mainly because if all these are examined in the mirror of the claimant's reasoning, it can be seen which are the barriers that should be passed.

In the above-mentioned case, the claimant referred to that the contract had been created by the hand-written signature of both parties, the employer justified its validity by a long stamp, and they sent the written contract to each other by post. Corresponding to this, the extraordinary termination should have been transmitted personally or by post to the claimant. The communication sent by the MSN program is deemed to be only verbal communication that is formally defective, so it is illicit. According to him, based on Article 38(2) of the Act entering the Civil Code into force (Act CLXXVII of 2013 on the Transitional and Authorizing Provisions related to the Entry into Force of Act No. V of 2013 on the Civil Code), disclaimers communicated via e-mail, the MSN program or other chat programs do not correspond to the written form required in Article 87(2) of the LC. The essence of the exchange of paper-based letters is that written words are lasting and cannot be modified later. Based on the content of Article 38(2) of the Act entering the CC into force, the exchange of disclaimers made by a permanent tool defined in a separate law can be considered to be a contract made in written form, so, especially an agreement created by a document with enhanced safety and signed by an electronic signature. According to the party, there were not any documents in the lawsuit case that could correspond to the rules associated with the above-mentioned literacy. In the lack of an electronic signature, a document created by a computer and sent in JPG format via the MSN program could not have been an electronic document.

The aim of the electronic document is the same as any other labour law document: causing a legal effect. But this aim should be fulfilled in the double expectation system as well to be valid in terms of content and format. But format and content cannot be separated in this case.

4. ENTRY INTO FORCE OF ELECTRONIC COMMUNICATION

If the electronic document is created in a valid form, the other very important question is how it will enter into force. Legal disclaimers entry into force by communication.

The LC knows personal, postal, and electronic communication. In case of the personal communication, the party making the legal disclaimer communicates it verbally or in a written form. Naturally, this can be only a paper-based or a simple verbal legal disclaimer as well. It is also important here to take into account the constraints defined by the rules. If the other party inhibits the communication or does not accept the legal disclaimer in the case of personal communication, it should be taken as communicated as well. There is also a possibility to communicate legal disclaimers by post, the validity of which is also strengthened by a delivery fiction, especially when the reception would be denied by the addressee. (Bíró, 2018) This option was a rebuttable presumption in the earlier literature in the legal texts. This has been put in place by Act CXXX of 2016 on the Code of Civil Procedure (hereinafter: CCP). But it should be added that the CCP has words only in terms of judicial documents. It is extended to other certain legal disclaimers by certain financial legal rules, such as Article 24(2)(3) of the LC in which the renewed conceptual basis is used for making legal disclaimers between the parties.

The legislator completed the above-mentioned facts in 2012 by acknowledgment of electronic communication. In the definition of the LC, *an electronic document can be considered to be communicated if the electronic document becomes accessible to the party* (Art. 24(1) LC). Proving this is not simple, mainly on the side of the communicating party as he/she has typically no license on the device used by the other party. In connection with accessibility, LC adds that *an electronic document becomes accessible when the addressee or the person entitled to receive gets an opportunity to get to know its content.* It means, practically, that an electronic document becomes accessible when it arrives at the computer tool of the affected person, i.e. the addressee or another person entitled to receive. (Bankó, Berke and Kiss, 2017, p. 120) However, it is important to add that highlighted that non-acceptance or intentionally inhibiting the legal disclaimer causes the same legal effects as the earlier ones, so the communication should be deemed to be in force (Last sentence of Art. 24(1) LC). 'Parking' the electronic letter containing the termination in the mailing system or not opening it consciously can also be the intentional inhibition of communication. It can be stated that the passive behaviour following the arrival of the electronic communication should be interpreted as the denial of the reception as well. (Barański et al., 2021) But as it has been mentioned earlier, it is seriously difficult to prove these from the side of the declaring party, so there is a literature point of view that especially recommends not using electronic communication as an exclusive communication form in case of legal disclaimers causing a significant legal effect. (Lőrincz, 2012, p. 69)

From a certain point of view, the claimant's reasons raised earlier in the case of No. Mfv.I.10.644/2013/9. strengthen this as well. The claimant told it in his justification that in addition to the fact that the document in JPG format can be freely rewritable and formattable, the proof of its sending and receipt is also problematic. According to him, neither the sender nor the addressee of the document is neither the claimant nor the defendant, but both of them are users marked by fantasy names. Later, this also supposes that the person of the sender and the addressee is not proved,

and it is also not proved who really sat in front of the computer at the time when the message exchange happened. The claimant also brought up the reason that there is not any receipt about the delivery of the termination, and the chat extract attached to the documents can also be manipulated. (Petrovics, 2020, p. 282)

In this current case, the uncertain facts mentioned by the claimant have not been proved, especially regarding the arrival and receipt of the document have not been denied by any of the parties. Although the claimant's suggestions can generally be considered to be valid, critical remarks on regulation, as digital contents are really easy to be manipulated and passive behaviours are also difficult to be proved. Electronic mail has taken over the institution of return receipt used in postal services as well. Of course, not in the same form as the normal postal delivery based on the earlier rules. In this case, the receiver signed the return receipt at the time of the receipt, and this could prove the time and, of course, the fact of the communication. But the return receipt with this name has survived only in the electronic mailing. The post has digitalized this service since 1 January 2021 and introduced electronic delivery confirmation. These primarily prevail in the communication between the employer and the employee. In the case of electronic mailing, this is not automatic, it depends on the intention of the addressee whether he/she returns the return receipt (delivery confirmation) to the sender or not. Of course, proving difficulties arise not only on the side of the sender but on the side of the receiver as well in the case when, in fact, not him/her was the person who opened the communication. It would be easy to define an expectation in the range of electronic communication which is currently involved in theAct V of 2013 on the Civil Code. However, the literature has recognized that the exercise requires triggering the legal effect of less bounding forms. (Pomeisl and Pozsonyi, 2020) And this demand is even more increased in case of labour relations. That is why the legislator does not follow the severity defined in the Civil Code in case of legal disclaimers made in electronically. It would not be too realistic as well. This could be told in the light that electronic communication hardly ever occurs in the establishment of a legal relationship, but mainly in its termination. Accordingly, the court should reconcile the legal force of certain legal disclaimers if a lawsuit develops between the parties. It should always be considered that the basis of diverging from the Civil Code is that the labour contract is completely different in nature. The regulation may take the laic element into account more.

According to Article 6:84(2) of the Civil Code, the party ensuring the electronic way is obliged to confirm the arrival of the other party's contractual legal disclaimer in an electronic way without delay. The labour law regulation does not contain this rule. But as I have written, in labour law, we are not talking about a problem occurring during making a contract, as the parties make this on paper, except in the public service sector. The declarations of intent of the parties point in one direction when concluding the contract. So, the validation of the Civil Code rule cited above is simpler. The parties have completely different interests at the time of the termination of a legal relationship. In some cases, the aim is not that the other party becomes aware that one of them has become aware of the disclaimer or when. So,

following this regulation in legal law relations is more difficult, so the proving questions are much more complex.

5. CONCLUSIONS

Using electronic communication forms and electronic documents still has a lot of questions that cannot be answered by the labour law of the beginning of the 21st century. This is partly because the legislator does not follow the employment phenomena of the 21st century and it continues to insist on the previous labour law forms. Although, the insistence in itself is not good or bad, if it cannot be made more flexible in the mirror of the changed working conditions, this will make legal exercise more difficult. On the other hand, the parties of the labour relation are also not so prepared for using the new conditions, and so for the digitalized labour law legal institutions. Appropriate infrastructure and education are often lack in their case. But this does not mean that digitalized solutions could not come into the foreground in the future. As the year 2020 has shown, digital solutions take us forward in this current, pandemic period, so the communication of electronic documents has become and will be more emphasized. Accordingly, the fate of this legal institution should be rethought. In our opinion, independent formal and content validity criteria should be defined about the electronic documents and their communication, and formal and content validity should be separated more.

Despite that the use of simple electronic documents suffers from a lot of critics in its current condition, we would not recommend its tightening in labour law, as the qualified signature systems are not available for several people. This should be rethought again in the future if the availability of these systems will be general. Until then, it seems to be necessary to redefine the formal and content criteria.

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