Journal of Law and Administrative Sciences
No.16/2021

SOME CONSIDERATIONS ON THE TRIAL PERIOD IN THE EMPLOYMENT AGREEMENT

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Abstract:
This paper aims to provide an analysis of the legal framework of the trial period stated in the employment agreement. In the light of the provisions of the Labor Code and the relevant case law, the paper highlights the issues that need clarification, that raise difficulties in implementation or that may lead to an unbalanced legal regime between the two parties to the employment agreement.
Keywords: *trial period, employment, employment agreement*

The trial period is a way of validating the employee's skills, a proof that takes place after the date from which the individual employment agreement takes effect. The analysis of Articles 20-31 of the Labor Code shows that the employer is entitled to validate the professional and personal skills of the employee at two distinct and cumulative times, respectively before concluding the individual employment agreement, duirng the selection process, and after starting work, throughout the trial period.

The existence of two distinct and cumulative stages in which the employee's skills are proved has also been validated by the relevant case law. Thus, it was noted that "it is found that the trial period, as a clause inserted in an individual employment agreement, is not incompatible with the conclusion of an employment agreement of indefinite duration with an employee employed after passing an examination or competition, whereas the Labor Code regulates the examination or selection contest as a means of verifying the employee's skills, optional or compulsory, as the case may be, and as a general rule the trial period is optional and subsidiary to the competition or examination, being useful to both contracting parties - to the employer, who can directly appreciate the competence and skills of the employee at work, as well as the employee, who in the event that he finds that the work entrusted to him does not suit him, will be able to decide unilaterally, unconditionally, the termination of his agreement. Therefore, the trial clause is in

accordance to the law, and may be included in an employment agreement concluded for an indefinite period, regardless of the occupation (with or without selection contest), being provided for the purpose of verification by the employer of professional skills. of the employee (art. 31 paragraph 1 of the Labor Code), beyond the theoretical and practical evaluations of the selection contest" [1].

Regarding the first moment of the proof of the employee's skills, respectively in relation to the selection, the Labor Code distinguishes between the rules applicable to private enterprises and those applicable to budgetary institutions and companies, as well as to public authorities.

In the case of private undertakings, the arrangements for conducting the selection proof shall be laid down by the decision-makers in that undertaking, in the applicable collective bargaining agreement, in the Staff Regulations - professional or disciplinary - and in the rules of procedure, to the extent that the law does not provide otherwise. In the case of public institutions and authorities and other budgetary bodies, the selection may be made only by competition or examination. A series of normative acts imperatively regulate the way in which the selection procedure must be carried out. As an example, we mention Government Decision no. 286 of March 23, 2011 for the approval of the Framework Regulation on establishing the general principles for filling a vacant or temporary vacancy corresponding to contractual positions and the criteria for promotion to immediately higher professional grades or ranks agreement in the budgetary sector paid from public funds [2] and Government Decision no.611 of 4 June 2008 approving the rules on the organization and career development of civil servants [3].

After the selection and only after the conclusion of the individual employment agreement, the proof of the employees' skills is carried out during the trial period. The Labor Code sets only the maximum duration of the trial period, leaving the parties free to determine, at the time of negotiating the agreement, its actual duration. From the analysis of the provisions of art.17 par.3 letter n of the Labor Code it results that the duration of the trial period is one of the essential elements of the individual employment agreement. It should be noted, however, that the enumeration of the trial period between the essential clauses of the employment agreement cannot entail the obligation to establish a trial period for all employment agreements. As has been established by doctrine [4] and case

law, the trial clause cannot be more than an optional clause. As an exception, the trial period is a mandatory and exclusive clause in the case of persons with disabilities, in which case the law provides that the proof of professional aptitudes for employment of persons with disabilities is carried out exclusively through the trial period of maximum 30 calendar days (art. .31 para.2 Labor Code). This provision creates, according to the jurisprudence of the Constitutional Court, “a way adapted to their situation, which takes into account both professional training and physical and mental capacity to respond concretely to the requirements of the job and which excludes comparison with persons who do not have a disability” [5].

The maximum duration of the trial period differs depending on the type of position - performance or management, the type of individual employment agreement - for an indefinite or fixed-term period and the employee's state of disability. Thus, in the case of an agreement of indefinite duration, the maximum trial period is 90 calendar days for executive positions and 120 calendar days for management positions. In the case of a fixed-term agreement, the maximum duration of the trial period is set according to the duration of the employment agreement, as follows:

a) 5 working days for a duration of the individual employment agreement of less than 3 months;

b) 15 working days for a duration of the individual employment agreement between 3 and 6 months;

c) 30 working days for a duration of the individual employment agreement longer than 6 months;

d) 45 working days in the case of employees employed in management positions, for a duration of the individual employment agreement longer than 6 months.

Due to a legislative inconsistency, the duration of the trial period is set and calculated on calendar days, in the case of an agreement of indefinite duration, and on working days, in the case of a fixed-term agreement. Along with the doctrine [6], we consider that it is necessary to unify the legal regime, in the sense of establishing the trial period on working days, the proof of the employee's skills taking place during the effective exercise of the duties.

During the execution of the individual employment agreement, only one trial period can be established. As an exception, the employee may be subjected to a new trial period if he / she starts with the same employer in a new position or profession or if he / she is to perform the activity in a job with difficult, harmful or dangerous conditions.

A special case of trial period is the internship period. Regulated by a special law [7], the internship is mandatory for higher education graduates who have a bachelor's degree or equivalent and, at the beginning of the profession, is employed with an individual employment agreement for a position according to the graduated specialization. Higher education graduates who prove that prior to graduation they have carried out, according to the law, for a period of 6 months, a professional activity in the same occupational field for which the internship is carried out, as well as those for whom the exercise is regulated by special laws.

The internship is carried out on the basis of a program of activities approved by the employer, which also includes the quantifiable objectives and performance indicators on the basis of which the evaluation of the graduate is performed. The evaluation is managed by a commission that draws up, with 5 working days before the end of the internship period, a report that includes the following elements:

a) description of the activity carried out by the trainee;

b) the degree of achievement of the objectives and performance indicators established in the program of activities carried out during the internship period;

c) the competencies and skills acquired by the trainee, the manner of fulfilling the attributions corresponding to the position occupied and the clauses of the internship agreement;

d) the conduct and the degree of involvement of the trainee during the internship;

e) conclusions regarding the development of the internship period;

f) other mentions (art. 8 paragraph 1 of Law 335/2013).

During the trial period, the employee benefits from all the rights and has all the obligations provided in the labor legislation, in the applicable collective labor agreement, in the internal regulation, as well as in the individual labor agreement. In the same sense, the Labor Code stipulates that the trial period constitutes seniority (art. 32 Paragraph 4 of the Labor Code). However, the employment agreement is not consolidated until after

the end of the trial period and only if the employee professionally corresponds to the position in which he is employed. "The assessment by the employer of the skills and professional training of the employee during the trial period cannot be censored by the court, the employer being the one able to assess the needs in relation to the specifics of the position, the requirements and efficiency imposed by him [8].

Therefore, although the legal provision uses the phrase “all rights”, it should not be ignored that the employee does not benefit from any of the guarantees related to the termination of the employment agreement at the initiative of the employer. Thus, after performing the trial period, the dismissal of the employee can intervene only for the causes provided by art. 61 and 65 of the Labor Code. Moreover, dismissal ordered in violation of the procedure provided by law is struck by absolute nullity (art. 78 of the Labor Code), the employer not having the right, in case of a labor dispute, to invoke before the court other reasons of fact or than those specified in the dismissal decision (art. 79 of the Labor Code).

However, during or at the end of the trial period, the individual employment agreement may be terminated exclusively by written notice, without notice, without the need to state reasons. This right is an exception to the principles of the effects of synallagmatic agreements - *pacta sunt servanda* and *mutuus consesus, mutuus dissensus* and brings an element of instability in the legal employment relationship. The Constitutional Court found that “the legal regime applicable to employment during the trial period was expressly regulated by the legislator as a special one compared to those for which no such period is established. Therefore, in order to verify the professional skills of the employee, the legislator also introduced a special condition, applicable to the employment relationship thus concluded, namely the notification provided in art. 31 para. (3) of the Labor Code, notification that does not need to be motivated and which is equivalent to the fact that the professional skills of the employee do not correspond to the requirements of the job. It is a discretionary decision made by the employer, who holds a position that also involves making such a decision. Moreover, the criticized contractual clause encourages the continuous professional development of the employees, being agreed and agreed by both parties at the conclusion of the agreement” [9].

Regarding the legal nature of the probation clause, both the doctrine and the case law have shown that we are in the presence of a cancellation clause [10], which can be invoked by either party to the individual employment agreement, regardless of the existence of sanctions. The effect of the exercise of the right of cancellation is that of the termination of the agreement, without the other party being able to oppose it.

Consequently, being a case of termination of the individual employment agreement, the employee does not benefit from any provision of protection provided by law in case of dismissal. Thus, it has been established by jurisprudence that the employer can apply the provisions of Art. 31 Para. 3 even if the employee is pregnant, as it is not "a dismissal, but a distinct legal institution, respectively the termination of the employment agreement during the trial period, based on the notification issued by the employer. Therefore, the provisions of Art. 60 Paragraph 1 Letter c of the Labor Code on the protection of pregnant women referring strictly to the measure of dismissal, cannot to be extended to other situations, being special provisions, of strict interpretation " [11].

In the same sense, it was established that the termination of the employment agreement pursuant to art. 31 para. 3 of the Labor Code may intervene despite the provisions of Art. 60 Para. 1 Lett. a of the Labor Code, which prohibits dismissal during temporary incapacity for work, established by medical certificate, according to law. The court held that "what is important in the present case is that at the end of the 90-day trial period the employer opted for the termination of the agreement in the manner conferred by the special rule (art. 31) and the employee's position in a situation of temporary incapacity for work, subject to the provisions of art. 50 lit. b The Labor Code, during or even near the end of the trial period, does not oblige the employer to postpone the measure adopted, or to extend the duration of the trial period by a number of days corresponding to the legal suspension of the agreement.

As indicated, the law is of strict interpretation and application, and if in the case of dismissal the employer is obliged to take into account the timing of the unilateral termination of the agreement, until the end of the period in which employment is suspended by law (regulating and the notice period), because in the latter case the employee must have the effective possibility to challenge the measure, not to be placed

in the position of requesting the who may lose the term of appeal, but also to benefit correctly from the notice necessary to identify another job.

This is the meaning of the interdiction established by art. 60 of the Labor Code, which allows the judge of the case to find without any other evidence that the employee has been denied this legal right to be in the period of performance of the employment agreement when the employer communicates the measure of dismissal. However, this is not the case with the situation regulated in art. 31, text found in Chapter I regarding the "conclusion of the individual employment agreement" of Title II of the Labor Code, therefore distinct from art. 58 et seq. Labor Code on dismissal and which are found in Chapter V on "termination of the individual employment agreement" [12].

A special case is the termination of the agreement when the employee is on probation due to the fact that he is starting with the same employer in a new position or profession. In this case, the question may be asked whether professional incapacity for the new position should not lead to the transfer to the previous position and not the termination of the individual employment agreement. This approach is influenced by French doctrine and case law, which distinguishes between the two types of trial periods (*période d'essai* - for the trial period established at the conclusion of the individual employment agreement and *clause probatoire* - for the trial period established at the beginning of a new function or activity) [13]. Despite the lack of express legal provisions in Romanian law, the Pitești Court of Appeal ordered "the reinstatement of the applicant in the position held prior to the issuance of the two dispositions, with the payment of salary rights with increases, indexations, recalculations from which the plaintiff benefited until the date of effective reintegration" [14]. Such a solution, briefly motivated, is likely to produce legal uncertainty, as long as it adds to the provisions of the Labor Code and contradicts the reasoning that the Constitutional Court had in the decisions rejecting the exceptions of unconstitutionality of Article 31 para. 3 of the Labor Code.

The analysis of the legal provisions as well as the jurisprudence shows that clarifications and amendments of the legal regime applicable to the trial period are necessary. This is all the more necessary as, being a cancellation clause, the legal status of the employee during the trial period is a precarious one, the individual employment agreement being legally consolidated only at the expiration of this period.

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