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Private Law

The Contracting Parties' Ability To Conclude The Employment Contract

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Abstract: This study's main objective is to analyze certain effects produced by the changes of the Labor Code and by the entry into force of the current Romanian Civil Code. These effects refer to one of the fundamental conditions for the valid conclusion of the individual employment contract, that is, to the legal capacity of employers and employees. Thus, a complete analysis of legal regulations and of the correlations between different provisions on the legal capacity of parties to the individual employment contract is required to identify the existing noncompliance and to propose solutions. The research demonstrated that the current regulatory framework governing the legal capacity of the parties to an individual employment contract does not entirely correspond to the social reality. Therefore, only the employer benefits from a relatively comprehensive statutory regulation on the legal capacity to conclude an individual employment contract. The employee, however, does not benefit from the same attention from legislature. Considering the above, the study represents a significant scientific contribution, whose value lies in the proposed changes to modify legislature, so that the legal capacity of job holders would benefit from fair regulation, in accordance with the principle of legal protection of employee rights.

Keywords: ability; condition employment; validity; contract

1. Introduction

The validity conditions represent all requirements that ensure the employment contract a full production of legal effects. In this sense, some of the legal requirements that must be met for a valid conclusion of the individual employment contract are common to all civil contracts, whereas others are specific to labor law.

The common conditions are the parties' ability to contract, the subject of the contract, the consent of the parties and the cause of conclusion.The specific conditions are the existence of the job, employee training, seniority and specialty

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thereof, verifying employee's professional skills, possession of an authorization, of a notice or certificate to pursue the occupation and also possession of a medical certificate by an employee to state that they possess suitable physical and / or mental abilities for exercising the position.

The purpose of this study is to analyze one of the general conditions that must be met to ensure the individual employment contract the legal power necessary for the existence of labor relations, in accordance with the principles of law governing these social relations, namely the ability of the contracting parties.

The ability of the parties to conclude the individual employment contract is an essential condition for the validity of this legal act. The ability of the natural or legal person is analyzed either in terms of usage capacity - a general and abstract ability to have rights and obligations - or in the capacity for exercise – ability to exercise their rights and obligations by committing legal acts. However, the ability is to be analyzed from the perspective of both contracting parties, considering the rights and obligations they have and assume by signing the individual labor contract.

2. The Legal Capacity of the Person to be Employed

The legal solution to this problem is found primarily in the civil code. According to the art. 42 (Beleiu, 2001, p. 32), the minor may conclude legal documents on labor, sports, artistic pursuits or on his profession, with the consent of parents or of a guardian, and with the provisions of special laws, if applicable. The minor exercises his rights and thus performs all the obligations arising from these acts and can use the received income.

At the same time, the intuitu personae character of the individual employment contract results in the indissoluble link between the capacity utilization and the exercise capacity of the person to become employed. This is a result of work being by definition personal, not to be accomplished by another person. Considering these aspects, the doctrine stated that in the legal relationship of employment, the legal capacity of the person to be employed can be considered unique (Ghimpu & Mohanu, 1998, p. 20; Tufan, 1997, p. 55; Ghimpu & Țiclea, 2002, p. 165).

The legal capacity to conclude employment contracts is subject to the biophysical capacity to work (Voiculescu, 2003, pp. 17-18). In this regard, the Labour Code establishes in Art. 13 that the individual becomes able to work at the age of 16.

The Labour Code, in conjunction with the constitutional and with the Civil Code expressly provides that an individual may conclude an employment contract as an employee working at the age of 15, if certain conditions are met. Firstly, there is the consent of parents or of legal representatives. Secondly, the contract is concluded for activities appropriate to the physical development, to the skills and knowledge of the minor person. Finally, by the work performed, the minor's health, development and professional training are not endangered.

To sum up, between the age of 15 and 16 the individual has a limited capacity to conclude an individual employment contract as an employee. Parental consent for the minor's employment must be prior or concomitant to the conclusion of the individual employment contract. This consent must be special, that is, it must target a particular contract and it must also be express, that is, have a clear, precise form (Ștefănescu, 2007, p. 300; Athanasiu & Moarcăș, 1999, pp. 46-47; Athanasiu & Dima, 2005, pp. 32-37; Țiclea et al., 2004, pp. 338 et seq.).

The individual between the age 15 and 16 who asks for employment directly expresses the will to conclude the employment contract, by signing it. Parental consent will only complement his will. However, lack of parental consent will draw absolute nullity and termination of the individual employment contract.

It must be specified that parental consent, although initially given when concluding the individual employment contract, may be withdrawn during its execution, if the respective work endangers the minor's development, in which case the contract will automatically be terminated under Art. 56 letter j) of the Labor Code.

In accordance with the provisions of Convention no.182/1999[1] on forbidding the worst forms of child labor and taking immediate action for their elimination and also in accordance with the Recommendation no. 190/1999 of the International Labor Organization, jobs likely to have negative effects on children are not only those harming their health, skills and knowledge, but also those affecting children morality. However, according to art. 32 of the Charter of Fundamental Rights[2] young people admitted to work must benefit from working conditions appropriate to their age and be protected against economic exploitation and against any work

[1] Ratified by Romania by Law no. 203/2000 for ratification of ILO Convention no. 182/1999 on the Worst Forms of Child Labour and Immediate Action for the Elimination adopted at the 87th Session of the General Conference of the International Labour Organisation in Geneva on June 17, 1999, published in the Official Monitor of Romania, part I, no. 577 of November 17, 2000.

[2] Proclaimed in Strasbourg on 12 December 2007 by the European Parliament, and the Commission entered into force on 1st of December 2009, with the Lisbon Treaty.

likely to harm their safety, health or physical, mental, moral or social development or compromise their education.

The conclusion of the above is that children under 15 years do not have the legal capacity to conclude an individual employment contract as an employee. Moreover, this is also a legal prohibition contained in art. 13 para. 3 of the Labor Code.

Individuals placed under judicial interdiction and also mentally ill individuals can not conclude an individual employment contract as an employee even if over 16, the prohibition appearing in the art. 13 para. 4 of the Labor Code.

There are also situations when the minimum age for employment is over 16. Thus, notwithstanding the general rule, the age of employment of a professional foster parent is at least 18, since, according to art. 2 para. 1 letter a) of Government Decision no. 679/2003[1], professional foster parent must have full legal capacity. Also, according to art. 3 of Law no. 22/1969 regarding the hiring of managers, collateral and liability in connection with businesses, public authorities and public institutions asset management, these can be managed only by an individual aged over 21. In the national labor law, the capacity of the person to be employed is subject to the minimum age and, in some cases, to certain incompatibilities established by law, but there is no upper age limit generally applicable.

2.1. Incompatibilities

Incompatibilities are those limitations or restrictions of legal capacity, expressly and strictly regulated by law, in order to protect the person and defense general interests of society. Incompatibilities are not presumed, can not be deduced by analogy and can not be extended. This is expressly and strictly regulated by law, operating only in the conditions and time periods provided in its content (Țiclea, 2007, pp. 48-49). If inconsistencies are applied other than in limited circumstances prescribed by law, this would be a violation of the constitutional principle of freedom of labor (Ștefănescu, 2007, 305).

The Labor Code does not regulate situations of incompatibility on concluding employment contracts. Prohibitions are emphasized by other acts belonging to the

[1] Government Decision no. 679/2003 on conditions for obtaining the certificate, certification procedures and status of professional foster care, published in the Official Monitor of Romania, Part I, no. 443 of June 23, 2004.

labor legislation and to the administrative, commercial or criminal legislation. Therefore, on concluding any individual contract what must be analyzed, in each and every case, is whether there is any legal incompatibility to the respective perso. This incompatibility does not allow concluding an individual contract for the provision of certain activities.

These incompatibilities take into consideration (Voiculescu, 2007, p. 19; Ștefănescu, 2007, pp. 200-201):

a. protection of women and minors:
   - prohibition of the use of pregnant and nursing women for harmful, dangerous, difficult or medically contraindicated jobs;
   - prohibition of the provision of night work by pregnant or nursing women;
   - young people under 18 cannot be employed in harmful, difficult or dangerous jobs and cannot be used to work at night;
   - in the case of apprentices, work under special or exceptional circumstances, additional work done outside working hours and night work are prohibited;

b. the interest of protecting public property: management jobs cannot be given people convicted for certain offenses or those who are not over 21 (in some cases 18);

c. fulfillment of the condition of unbroken reputation (special moral authority, integrity and fairness):
   - the person who has a criminal record or one that does not have a flawless reputation cannot be a magistrate;
   - individuals who have been convicted of certain crimes cannot be part of to the staff of the Court of Auditors or of the Financial Guard;

d. incompatibilities based on provisions of criminal law:
   - additional penalty of interdiction of certain rights, consisting of prohibition to hold a function involving the exercise of state authority or exercising a profession that the convict used for an offense;
   - if the offense was committed as a result of lack of ability, lack of training, or other causes making him unfit for certain functions or professions, the court can take safety precautions consisting of the prohibition to hold such a function, profession or occupation in the future;

e. ensuring national defense or security. Foreigners cannot be employed in the judiciary, in the prosecution, by businesses or institutions, which, by their specificity, are important for national defense or security;

f. incompatibilities based on commercial law: according to Art. 137 ^ 1 para. 3 of companies Law no. 31/1990 republished, amended and supplemented, in the performance of office, managers of a joint stock company may not conclude an individual labor contract with the company. If any of the company's employees have been appointed administrators, the employment contract is suspended during the term. The same incompatibility establishes the law for CEOs, according to art. 152 para. A.

g. incompatibilities based on the special purpose of concluding individual employment contract, in the case of a professional foster care. To protect rights and interests of children, according to Decision 679/2003 on conditions for obtaining the certificate, certification procedures and professional foster care status, a special incompatibility is established. It refers to the prohibition to apply in the case of individuals convicted by final court decision for committing a crime, for individuals deprived of parental rights or for those who have a child declared abandoned by a final court decision - art. 2 para. 2 letters a) and b) of that court decision.

Also, for the same purpose, the mentioned legislative act establishes by art. 2 para. 3 incompatibilities for all paid jobs, except for the professional foster. It establishes that the person who has a job, other than the mentioned one, can become a professional foster only after termination of individual labor contract for another job. Retired individuals, certified as foster professionals, may work based on an individual labor contract concluded concurrently with the pension, according to art. 8 para. 5 of the same law.

Legal reason to limit the ability of individuals to be part of an individual employment contract as a professional foster lies in the special situation of children who are raised, cared for and educated under such contract. The individual contract of employment concluded with the professional foster involves a permanent work program. The exercise of other functions is impossible under any other individual contract of employment with another employer. Although this type of contract is part of the work at home contracts, unilateral establishment of employee working hours, under Art. 105 para. 2 of the Labor Code, can no longer find applicability to professional caregivers (Ștefănescu, 2008, pp. 23-50).

The legal issue which arises is not that of the purpose for which incompatibility for professional maternal assistants was established. It refers to the means of limiting the ability of individuals to receive more than one individual employment contract, as recognized by Art. 35 para. 1 of the Labor Code. Thus, according to the mentioned legal text, any employee has the right to cumulate several positions on the basis of individual employment contracts, benefiting from the salary corresponding to each of them. In paragraph 2 of the same Article incompatibilities of concurrent positions are subject to an exception. The rule is that they are established only by law. The analysis of these laws results unequivocally in the fact that incompatibilities can be established only by law, as an act emanating from the legislature and not by the legislation, which is emanating from the executive. Consequently, *de lege ferenda*, incompatibilities for professional maternal assistants must be applied by Law no 272 of 21 June 2004 on the protection and promotion of children rights[1] and not by government decision, as it is today.

Given the above mentioned, it can be concluded that the effect of a situation of incompatibility of a person seeking employment is materialized in the legal impossibility to validly conclude a certain individual employment contract as an employee. Violation of these prohibitions leads to absolute nullity of the individual employment contract and, therefore, to the termination of contract, on avoidance, amicably or judicially.

2.2. Concurrent Positions

Concurrent positions refer to that situation in which the same individual is employed simultaneously based on two or more individual employment contracts. The Labor Code governing concurrent positions in art. 35 covers only work under individual employment contracts.

In accordance with art. 35 of Labor Code the rule in labor relations is the admissibility of concurrent positions, based on individual employment contracts. The employee benefits from the salary corresponding to each of them. Concurrent positions are allowed for all employees, regardless of the nature or quality of employers (Țiclea, 2006, p. 121), but with some exceptions.

Given the above mentioned, the legal provision which allows the overlapping of two or more contracts of employment concluded with one employer, should be

[1] Published in the Official Monitor of Romania, Part I no. 557 of June 23, 2004.

completed in the sense of establishing a maximum time limit of work performed under these conditions. Otherwise, there may be even a violation of mandatory rules concerning the maximum working time. This would occur given that on two or more contracts with the same employer, the working time for each would accumulate and would exceed the average of 8 hours per day and 40 hours per week. Moreover, in terms of other rights deriving from being an insured employee, one is not allowed to appear with more than 8 hours a day during 5 working days for the same employer. Personal income statements that are made monthly are designed in this way[1].

According to art. 35 para. 2 of the Labor Code, however, situations in which there are legal incompatibilities for concurrent positions are exceptions to the rule. Employees who have more positions have the right to choose their main function and have the obligation to declare it to each employer, according to tax laws. The doctrine stated that the employee cannot choose discretionary their main position. The employer's agreement is necessary (Țiclea, 2006, p. 149), as the latter ensures the employee certain rights, other than salary. Therefore, this employer applies the tax deductions on salary tax calculation.

The employee having more positions based on individual contracts of employment concluded with different employers may change the main position from one employer to another during the execution of these contracts, under the law. In this case, the Court has decided (Gidro &Iliuț, 2003, pp. 101-108) that this change does not have the legal significance of terminating the individual employment contract of the employee with the employer who established the first main position as the employee continues working for this employer. Changing the main position from one employer to another is in fact a change in the individual employment contract. It is a modification of an element that is unessential, but important to the two contracting parties in terms of legal effects.

The Labour Code makes no distinction between the duties of the employer where the main position is held and the one where the position is concurrent, both having the obligation to provide the employee all employment rights, thus an equal treatment between employers is ensured, on the one hand, and also between

[1] See Ministry of Labour, Family and Equal Opportunities no. 1019 of 23 November, 2007 amending the Rules for the implementation of Law no. 19/2000 on public pension and social security, with subsequent amendments, approved by Ministry of Labour and Social Solidarity. 340/2001, published in the Official Monitor of Romania, no. 831 of December 5, 2007.

employees with main positions and those with concurrent positions on the other hand.

3. Legal Capacity of the Employer

The employer is the part of the individual labor contract that benefits from the work performed by an employee under his authority, who must ensure the conditions necessary for employees to work in safety, and to remunerate the work done by them. The employer, regardless of the legal form of organization and its specificity, must have legal capacity in order to be part of an individual contract. The Labour Code, art. 14 para. 1 specifies that the employer may be a legal entity or natural person, which means that the problem of employer capacity is seen differently, depending on the category they fall into. It should be noted, before analyzing the legal capacity of a legal person employer and that of an individual employer, that having a legal entity employer is the common situation in labor relations.

3.1. The Legal Entity Employer

In accordance with art. 14 para. 2 of the Labor Code the legal person may conclude an individual contract of employment as an employer once they acquire their legal personality.

The legal person has, as an individual, one capacity of utilization and one of exercise. According to art. 206 para. 1 of the Romanian Civil Code, the legal person may have any civil rights and obligations, except those which by their nature or by law, are only found in the individual. According to para. 2 of the same article, non-profit legal entities may have only those rights and obligations necessary for the purpose established by law, articles of incorporation or statute. Legal acts concluded in breach of these statutory provisions are absolutely void. From the perspective of labor law, the principle of capacity of usage specialty of the non-profit legal person is supposed to include only people whose skills and training can ensure reaching the purpose for which they were established.

The exercise capacity of the legal entity is the ability of the collective subject to exercise rights and fulfill obligations by legal acts concluded by its management bodies, after their creation. According to art. 209 of the Civil Code, the legal entity

exercises rights and fulfils its obligations through its management bodies. The quality of management bodies is possessed by natural or legal personsThese persons are, by law, by articles of incorporation or status, entitled to act in relation to third parties, individually or collectively and on behalf of the legal person. Relationships between the legal entity and those who make up its management bodies are analogous to the mandate rules, unless otherwise provided by law, articles of incorporation or statute (Art. 209 para. 3 of the Civil Code).

Depending on the legal person employer organization, there are differences regarding the management bodies, bodies that represent the employer in the contractual employment relationship.

Thus, the literature stated that for the legal person employer, are entitled to individual employment contracts the following (Ștefănescu, 2007, p. 205):

- the administrator, the chairman of the board or chief executive for companies / national companies, for the companies where the state or a local government authority is the major shareholder;
- the general manager for autonomous;
- the Board of Directors, the manager, the steering committee, the president, the general manager, the chief executive for companies majority-owned or private;
- the management body consisting of one person for institutions or public units (minister, director, mayor, etc.);
- the individual or collective body in the case of other legal entities, as provided in the act of internal organization, that is, in the statute or regulation.

The analysis shows that for all legal persons, the individual employment contracts are concluded on their behalf by the head unit, or by the collective management body. If the employment contract was concluded by a person who is not a management body of the legal person, or by a person who was given such a mandate, but who exceeded his powers, the contract is relatively null and void. Nullity may be covered by countersigning the individual employment contract by the person entitled to such tasks.

The legal person may delegate power to conclude individual contracts of employment to its units without legal personality (branches, agencies, offices). This delegation must be explicit and specific. Thus, art. 2 para. 3 of Government

Decision no. 500/2011 on the general registry of employees[1] states that employers who delegated their own entities without legal personality the authority to hire by concluding individual contracts of employment, may delegate them the power of setting the registry.

3.2. The Individual Employer

The Labour Code, when mentioning the employer, considers not only the legal entity but also the individual, stating that this individual, in order to conclude individual work contracts, must have full legal capacity (Art. 14 para. 3 Labour Code). Therefore, to detail the legal provisions mentioned, it is necessary to interpret them in relation to the civil code relating to the individual. According to art. 37 of this law, the exercise capacity is the ability of the person to conclude civil legal acts. The analysis of legal text shows that the legislature considered, when drafting the Labour Code, the full legal capacity of the individual.As the full legal capacity is acquired at the age of 18, it means that, before reaching this age, children cannot act as employers, except when, in special cases, they acquire full legal capacity before the age of 18 (married child aged 16 to 18 years, according to art. 39 of the Civil Code).

3.3. Limitations of the Legal Capacity of Individuals to Individual Employment Contracts as an Employer

Exceptionally, the law can make use of the capacity limitations of the individual. Regarding labor relations, what is of great interest is the limitation of use of the individual. This is contained in art. 28 para. 4 of the Government Emergency Ordinance no. 44/2008[2] on economic activities performed by authorized individuals, sole proprietorships and family businesses. According to the legal provision mentioned, the family business may not employ a third party with a work contract. This legal prohibition applies only to the conclusion of individual labor contracts aimed at activities authorized. There is no limitation to the use of the natural capacity of the individual employer to conclude employment contracts for

[1] Published in the Official Monitor of Romania, Part I, no.372 of 27.05.2011, amended by Government Decision no. 1105/2011 published in the Official Monitor of Romania, Part I, no. 798 of November 10, 2011.
[2] Published in the Official Monitor of Romania, Part I, no. 328 of April 25, 2008 and amended later.

domestic workers, at his home, unrelated to the activities for which authorization was obtained under this law.

The analyzed prohibition, representing a capacity limitation of the individual, must be interpreted strictly, which means that individuals who are not traders, are not affected by this regulatory provision.

In conclusion, the person hiring under an individual contract of employment, is called an employer, in accordance with the Labor Code. Both a legal and an individual person may be an employer. The synonym that is used, both in law and in literature is that of patron. In this respect the definition of a patron given by art. 1 letter v of Law nr.62/2011 of social dialogue[1] should be mentioned. According to that definition, the patron is the legal registered owner, an individual person authorized by law or the person exercising a craft or a profession independently, managing and using capital for profit under competition and who undertakes employment.

The term employer, used by the Labor Code, is more comprehensive than that of patron, the latter aiming at business profit, primarily using capital, which is not characteristic of all employers. Thus, public institutions, non-profit organizations, unauthorized individuals may be employers, although they may not not meet all the requirements of Art. 1 letter v) of Law no. 62/2011 of social dialogue. Consequently, the patron can be mainly an employer, but the employer does not necessarily have to be a patron.

The 1998 Communication of the European Communities Commission defines illegal or undeclared work as "any paid activities that are lawful as regards their nature, but not declared to public authorities, given the differences in the regulatory system of Member States".

Undeclared work is an activity that is performed without being declared to the public authorities and, therefore, is an activity for which taxes are not paid, and there is no contribution to social security budgets. Unreported income escapes taxation, contributions are not paid to the social insurance system and employees fail to declare income received for these activities illegally, because they avoid income tax accordingly. Therefore, society as a whole is deprived of significant revenue that could serve, among other things, to the financing of social protection systems.

[24] Published in the Official Monitor of Romania, Part I, no. 322 of May 10, 2011.

Companies with undeclared activities cause, in addition, serious harm to those businesses that declare their activities and often have economic difficulties or are forced to cease trading, while the lower costs of companies with undeclared work help them remain on the market and even develop, which causes degradation of the whole economy.

Undeclared work is a phenomenon that occurs in any society, according to the Report "Undeclared work in an enlarged Europe" of the European Commission (published in May 2004).

Undeclared work is produced with the involvement of employers and employees and can be divided into three groups:

- businesses resorting systematically and in an organized manner to undeclared work, often combining it with legal work: businesses that pay wages wholly or partly undeclared;
- employees with two or more jobs, some of which are not declared;
- unemployed people who are obliged to work illegally because they cannot get a job in the legal job market, combining or not undeclared work with receiving unemployment benefits or health insurance.

In the three cases reported, the undeclared work involves tax fraud, in addition to unfair practices that reduce collective morality and sense of responsibility necessary in a society where a significant part of the resources are transferred to social insurance. However, the damage that undeclared work brings cannot be measured solely in economic terms, as living and working conditions of employees who must necessarily resort to illegal labour in order to subsist are under acceptable thresholds of society which they belong to.

Finally, it should be noted that state law and the collective welfare system require compliance with the law and, therefore, it is necessary to solve the problem of undeclared work by certain global and specific measures. Therefore, this issue will be part of the European Employment Strategy, which aims to create a higher quality of work.

4. Conclusions

Taking into account the analysis performed on how the current civil code has marked the legal capacity of the parties as a background condition for the valid conclusion of the individual labor contract, it is clear that the present legislation fails to address all the needs of society. Also, there are legal provisions that restrict the ability of the legal entity to conclude employment contracts as an employee, some unwarranted and, in our view, unconstitutional.

Other legal provisions are incomplete and we refer to those related to the overlapping of functions within the same employer, by signing several individual labor contracts, which generates an incorrect and even illegal application, by overcoming the daily work time and violation of overtime work regulations. In this context, this study is intended as a blueprint for the current normative regulations that identify both positive and negative elements, with the hope that lawmakers will address the existing nonconformity, so as individual labor relations would be conducted in a fair legal framework, respecting the principle of protection of employee rights.

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