LEGAL NATURE OF THE INDIVIDUAL EMPLOYMENT CONTRACT

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Abstract

Obviously, the juridical act based on which a person works for and under the authority of another person in exchange of a salary can be only an individual employment contract, as the Labour Code specifies. So, in this case we are talking about a contract which should be governed by the rules of this matter as the common civil law stipulates, including the freedom of negotiation and concluding of this legal act. Unfortunately, on the present Romanian labour market the labour contract is transformed into a contract of adhesion, imposed by the law. This reality, which can't be ignored, distorts the legal nature of the labour contract and the free will principle which must be respected during the negotiation and conclusion of the individual employment contract.

Keywords: *individual employment contract, negotiation, free will, equal positions before the law of parties, subordination relationship*

The individual employment contract is actually considered, inclusively by its legislator, the main institution of the labour right, of the individual labour right, because the Labour Code establishes it about a third of its regulations (from Article 10 to Article 107 of the total 298 items).

Consequently, as it is defined by Article 10 of the Labour Code and by the professional legal literature, the individual employment contract is "the contract (agreement)[103] under which a natural person, named employee, undertakes to perform work for and under the authority of an employer, natural or legal person, in exchange for a remuneration called wages" and with ensuring the appropriate conditions for carrying out and maintaining work safety and health. It is obvious that we find ourselves in the presence of a contract with all the specifications of this bilateral legal act, ruled by the principle of free will. Even more, the individual employment contract is a contract named, synallagmatical (the parties' obligations are mutual, meaning that each parties' obligation represents the legal cause of the co-contractor's obligation), for valuable consideration, commutative, consensual (the form demanded by Article 16 of the Labour Code is only *ad probationem*), *intuitu personae* (it is concluded in the view of employee's training, skills and qualities, but also in the view of employer's specific activity) and with successive fulfilment (both parties provisions are done in time and not all at once).

Generally, the individual employment contract may have just two parts: the employer, natural or legal person and the employee, always a natural person. By exception, there are certain

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[103] It is considered that the legal definition of the individual employment contract has a deficient character, because, in the Romanian law, the labour terms and those of convention are synonymous. So that more appropriate wording would be "the contract... ... is the convention" instead of "the contract ... is the contract", in order to avoid the idem per idem character of the definition - in this sense Al. Țiclea, *Acte normative noi - Codul muncii*, in *Revista Română de dreptul muncii* no. 1/2003, p.8.

We consider that the definition's need of legal rectification is not an imperative one, given the fact that the deficiency is not a fund one, but strictly a form one. But on the other hand, it should be supplemented by the employer's obligation to provide the necessary conditions to conduct in good condition the work, and not only the obligation to pay wages.

situations where, as employers appear more persons, as it is the case of associative forms to practice the professions of lawyer, notary or physician. In this cases, the labour contract is concluded under the name of all associates, following that the employee subordinates to all these. The same solution is to be applied for the domestic staff too, in the sense that, even if the contract was signed by one spouse, the person hired will subordinate to the other spouse too.

Contrariwise, not only the individual employment contract supposes as object the provision of work. Work can be done under a service contract, but what distinguishes the two types of contracts is that in the case of the employment contract, the work is seen as a process that takes place over time in a well-determined place, while in the case of the service contract, the provider is hired to achieve a particular result[104]. In this context, it must be specified that the employee's obligation resulting from the individual employment contract is an obligation to make, but to which are not applicable the provisions of Article 1077 of the Civil Code, which allow to the creditor, in case of non fulfilment, to execute him, on his account, the debtor's obligation. The provisions of Article 1075 of the Civil Code, according to which each obligation to make changes in indemnifications, in case of non fulfilment, are not applicable in this context too. But, it is possible to include in the labour contract a stipulation of an objective, leading to other consequences regarding the employee's qualification, in terms of its object. Thus, we are in the presence of two obligations of the employee: an obligation of means, which supposes the submission of diligences to achieve the goal and an obligation of result, which absorbs the first, consisting in achieving the proposed object[105].

Returning, we must not forget the fact that only the work performed under an individual employment contract gives the employee, on full right, seniority, with all consequences arising there from.

Finally, what individualizes the employment contract in relation to other types of contracts, what could have the same object or a similar object, are its elements. Thus, *the elements of the individual employment contract* are: the labour supply, the payment of the salary and the subordination relationship. Some authors associate with these three elements the time[106] element too, but we consider that the latter is not likely to be part of the elements of the contract in question. Without insisting on the first two, the labour supply and payment of the wages, we may say that they represent the two characteristic and mutual provisions of the synallagmatical contract, but the subordination relationship is the item that confers individuality to the contract and a special status among the other types of contracts. The existence of this item results clearly from the legal definition of the individual employment contract; even if the legislator did not use the term of "subordination", preferring that of "authority", it has not been made a change of view, because, the term "authority" designates the power, the employer's right to give mandatory provisions. Therefore, the subordination relationship between the employer and the employee appears during the performance of the labour supply of the latter. So, it can not be concluded an individual employment contract between the sole associate of a limited liability company and the company concerned, as the essential characters of the individual employment contract are lacking: legal subordination and bilateral negotiation of the contract.

In this particular case, the subordination refers to the work process and it manifests, by the employer's right to give orders and provisions to the employee and to control his work. Ensuring the employer's authority is achieved through its recognized provisions, under the Article 40 paragraph 1 of the Labour Code, respectively the normative power, the organizational and disciplinary one.

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[104] Al. Athanasiu, M. Voloniciu, L. Dima, O. Cazan, *Codul muncii. Comentariu pe articole,* p. 35.

[105] In this sense O. Macovei¸ *Conținutul contractului individual de muncă*, Edit. Lumina Lex, Bucureşti, 2004, pp. 65-66.

[106] V. Barbu, *Dreptul muncii. Curs universitar*, Edit. Național, Bucureşti, 2003, pp. 91-92.

Thus, the subordination, as item of the individual employment contract, may be both legal, meaning the existence of the authority, the employer's power of directing the employee's activity, to control and sanction him disciplinary, and economic too, since the employer provides the livelihoods of the employee who, in principle, has no other income.

The question arising is if the existence of this subordination relationship transforms the individual employment contract into a legal act of adhesion or if it justifies this thing? To answer to this question we must, firstly, distinguish between two important moments: the negotiation and the conclusion of the labour contract moment and its execution moment.

During the moment of the *negotiation and the conclusion of the individual employment contract* the parties involved are on *equal positions before the law*.

The will's agreement always requires the conciliation of two or more contradictory legal interests[107]. Thus concluding the contract often requires a period of negotiations, by considering the interests of each party. So, the negotiation can lead or not to the conclusion of a contract. The same situation is found in the case of the individual employment contract too.

Thus, the negotiation of the labour contract represents one of the most important stages in forming the wills' agreement, importance clearly underlined by the legislator too, who, in Article 17 Labour Code, establishes that the employer has the obligation to inform the selected person for employment regarding the essential clauses he intends to introduce in the contract, clauses further enumerated in paragraph 2 of the same article. *We believe* that the law's wording left room, in practice, for interpretation within the meaning that the clauses of the labour contract are imposed. Moreover, legally developing a framework Model of individual employment contract by Order no. 64/2003, amended by Order no. 76/2003, does nothing else but to support this thing and to strive to defeat the principle of freedom and autonomy of will that should govern both the negotiating and conclusion moment of the labour contract. For this reason, most times this contract is transformed into an act of adhesion.

Consequently, the content of individual employment contract is considered to have a double juridical nature, legal and contractual, in juridical literature[108]. Legal part is referring to the rights and obligations from Labour Code and other bills which regulate the labour relations. This legal part, we consider to be important especially regarding public authorities and institutions workers, because their salaries, recreation leave and the amount of recreation leave are established by special laws.

The contractual part of the contract, on the other hand, is determined by the free will of the parties, but only if they respect the legal limits.

We believe, that to impose directions to negotiate the labour contract should not make this contract into an impose one, because we believe that the intention of law wasn't to modify the equal position of the parties in negotiating and concluding the labour contract.

We must specify that, the appearance and the "use", more and more intensive, of the adhesion contracts has led to the reconsideration of the limits of the will autonomy principle of the legal deeds. If in the case of the classic contract the parties mutually agree over its content and effects, in the adhesion contracts only one party establishes the contractual clauses, the other party being just free to join or not the contract developed under these conditions[109]. The fact that these

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[107] Flour, J.-L. Aubert, *Droit civil. Les obligations. L'acte juridique*, vol. I, Paris, 1975, p. 404.

[108] See, Al. Ticlea, *Tratat de dreptul muncii*, second edition, Ed. Universul Juridic, 2007, p. 429-431.

[109] V. Pătulea, *Principiul libertății contractuale și limitele sale*, in *Dreptul* nr. 10/1997, p. 24. Regarding the contracts with clauses imposed only by one of the parties, the Contract Law of the Popular Republic of China stipulates the following: if a contract contains standard clauses (meaning contractual provisions established before concluding the contract by one of the parties, for repeated use), the party that established these clauses must comply with the principle of good faith in prescribing the rights and obligations of the other party and must draw the

contracts are and may become a legal limitation of the principle of will autonomy it is noticed from the regulation of the adhesion contracts too, in the new Civil Code, which in Article 1175 states: "The contract is one of adhesion when its essential clauses are imposed or when they are drafted by one of the parties, for this one or following his instructions, the other party having merely the obligation to accept them as such".

Due to the new limitations of the principle of contractual freedom, which tend to deny the very existence of the principle, we believe that it is not irrelevant to take into consideration the possibility of legal and institutional isolation of those types of contracts and their understanding as a distinct reality from the contractual, classical one. This is done precisely to protect and perpetuate, not only theoretically, the principle in question. But, on the other hand, the proliferation of these types of contracts it may seem that they represent one of the symptoms of defeating the principle of will autonomy by another socio-economical phenomenon and finally a legal one, that of dirigisme[110]. Actually, we are talking about the strong intervention of the state in the economy, reflected in the enactment of some new legislation or amending the existing ones, or by sanction of the law of the new interpretations given to some oldest legal institutions[111].

Another manifestation of dirigisme is to broaden the concept of public order, because, if in the previous phase (that of domination of the principle of will autonomy) this concept was limited to the political and moral area, in principle, now, the concept includes the economic public order too, not only the national one, but the European too, in the context of creating and expanding the European Union. Moreover, the notion of public order extends over some social aspects too, creating the social public order, which designates some measures taken by the State regarding the regulation of the labour contracts and leasing of estates. Also, it must not be omitted the aspect that the State's intervention in the contractual domain lead to the restriction of the binding force of the contract, either because sometimes its non-compliance is allowed, or a performance in other terms than those originally established by the parties[112].

Returning to *the employer's obligation of information*, we consider that, in fact, it has the significance of an offer to conclude. In other words, in the content of the employment contract, which is concluded later, it will be included the same elements, but their concrete quantum may differ as a result of the parties' negotiation. If any modification was not allowed, the information would coincide with the implementation agreement of the parties, which would deprive the obligation of information of any content and would violate the freedom of the parties to negotiate the terms of this contract.[113] As it is mentioned by the legal text too, the negotiation must cover at least the following items: identity of the parties; the workplace or, in the absence of a permanent

attention to the latter, in a reasonable manner, on certain clauses, such as are those by which the liability of the party is excluded or limited and, also, this party is obliged to explain to the other party the contract's terms when asked (Article 39).

[110] Otherwise, a new term was created, that of "contractual dirigisme", by L. Josserand, in *Les tendances actuelles de la théorie des contrats,* in R.T.D. civ., 1937, pp. 1-30.

[111] The appearance of the contractual dirigisme is due to the fact that nowadays the economic activity is dominated by the existence of large companies or groups of companies, with a great economic power, whose interests are focused on increased speed and suppleness of the economic circuit. The State, the one that organizes the economic activity, even in a broad sense, by creating the legislative framework, has perceived and finally enacted the interests of those participants to the economic circuit. All these lead to the removal, more or less, of the principle of will autonomy, which corresponded to the modern period, when the economic activity was left, largely, at the private initiative's will and which corresponded, in fact, to the economic liberalism (C. Stătescu, C. Bîrsan, *op. cit.*, pp. 17-19).

[112] In this regard, see A. Hurbean, *Viciile de consimțământ*, Edit. Hamagiu, 2009, p. 31 and following.

[113] Similarly, Al. Athanasiu, I. Dima, *Regimul juridic al raporturilor de muncă în reglementarea noului Cod al muncii*, in *Pandectele române*, nr. 4/2003, p. 258.

workplace, the possibility of working in several places; the headquarters or, as appropriate, the domicile of the employer; the position / occupation according to the Romanian Classification of Occupations or other regulatory documents and the job description; the job-specific risks; the date when the contract takes effect; in the case of an employment contract of limited duration or of a temporary employment contract, its respective length; the length of the leave the employee is entitled to; the conditions under which the contracting parties may give notice and its length; the basic wages, other components of earned income, as well as the payment frequency for the wages the employee is entitled to; the normal length of work, expressed in hours per day and hours per week; the reference to the collective labour agreement governing the working conditions of the employee; the length of the probationary period. Of course, nothing stops the parties to negotiate on other clauses they want to stipulate in the future contract. Otherwise, the Labour Code itself regulates four of the additional clauses (the clause on vocational training, non-compete clause, mobility clause and confidentiality clause).

According to Article 18 paragraph 1 of the Labour Code when the employee should perform his activity abroad, the employer has the obligation to communicate him information regarding the following aspects too: the length of the work to be performed abroad; the currency of wages payment, as well as the payment methods; the benefits in money and/or in kind related to the activity performed abroad; he climatic conditions; the main labour law regulations in that country; the local customs whose breach would endanger his life, freedom or personal safety and the employee repatriation conditions.

Because we are at a stage prior to the conclusion of the individual employment contract, the employer's obligation of information must be done between the time of selection the candidate, future employee and that of employment, without being relevant if the parties finalize the negotiations concluding a contract or not. At this precise moment too, as the legal texts establish, between the parties may occur a confidentiality contract. As stated in the legal literature[114], the confidentiality contract is completely separate from any employment contract; it is not confused with the confidentiality clause either, which can be inserted in such a contract. Taking into consideration the legal wording, this is a contract that generates only unilateral obligations for the employee or future employee, respectively the obligation to keep the confidentiality of the information received. Still, we believe that this contract could contain mutual obligations, based on Article 29 paragraph 3 and 4 of the Labour Code. It could stipulate the employer's obligation to keep the confidentiality of the information he receives from the other party, regarding, for example, the professional skills or the information taken from his former employers.

If the obligation of information has the role of an offer to conclude, than the acceptance of the labour offer has as consequence the contract's formation, which means that the employer is no longer entitled to withdraw his offer. Thus, an eventual withdrawal shall have the legal value of an illegal dismissal. The provisions of the Common Law, regarding the valuable forming of the contracts by offer and its acceptance, are fully applicable to the individual employment contract too. So, if the offer is the proposal made by a person to another person, to conclude a contract, the acceptance represents a manifestation of the person's will to conclude a contract as provided in the offer addressed to him for this purpose. The acceptance can only be pure and simple, because formulation of some reservations, conditions or modifying proposals has the nature of a counteroffer, and it is usually intentionally, but it can be made tacitly too. In all cases it must be unequivocal. The acceptance, made valid before the offer has been revoked or has been lapsed, has as effect the conclusion of the contract it refers too. The acceptance intervened subsequently is late

[114] R. Dumitriu, *Contractul individual de muncă, prezent şi perspective*, Edit. Tribuna Economică, Bucureşti, 2006, p. 88.

and does not produce any effect; but if the offer was mindless revoked before the expiry of the express or tacit term of acceptance, the acceptance interfered within the limits of this term shall entitle the acceptant at the repairing of the prejudice caused by the non-conclusion of the contract following the offer's abusive revocation.

The contractual freedom, the will's autonomy of the parties during the negotiation and the conclusion of the individual employment contract is *limited*, on one hand, by the rules of the public order, morals and mandatory rules – general limits to all contracts, and, on the other hand, by the provisions of the applicable collective labour agreement and Article 38 Labour Code. Is obvious that the negotiation freedom of the individual employment contract is much more limited compared with that of the civil contracts, reason for witch it was stated that Article 38 Labour Code represents a fundamental mark of delimitation between the labour law and the civil law.[115]

Without insisting too much on the general legal limitations of the will autonomy, we may say that by public order it is understood a set of rules and principles that express the essential legal organization of a particular human society, at a certain time. Regarding the good manners, it is underlined[116] that these represent nothing else but moral aspect of the public order, in its traditional acceptance of political order, in fact, a set of ethical rules, well-known and accepted therefore by the society's members. Just that this concept, as well as that of public order, can not be ever general applicable to the human society and it is in a continuous evolution.[117]

The limitations imposed especially to the contractual freedom by the labour's legislation refer, as we have already said, mainly at the provisions of Article 38 Labour Code, which include those referring to the collective labour agreement too. Specifically, corroborating Article 11 and 38 Labour Code, any clause from a convention or unilateral act, by which an employee would consent to a limitation or waiver of rights guaranteed by law or to those negotiated through the collective agreement or individual employment contract, is touched by absolute nullity.

According to Article 8 of the National Collective Agreement, the employees' rights stipulated in its content can not represent the cause of reducing other collective or individual rights that were established by the collective agreements concluded at branch level, groups of units and units before the conclusion of the National Collective Labour Agreement.

In the situations in which, regarding the rights deriving from the National Unique Collective Labour Agreement, it intervenes more favourable provisions, these will be lawfully a part of the mentioned contract.

Also, the signatory parties of the National Unique Collective Labour Agreement assumed the obligation that, during the period of application of this collective labour agreement, they should not promote or sustain draft laws whose adoption would lead to the reduction of the rights arising from the collective labour agreements, regardless the level they were concluded to.

Consequently, as noted in the legal special literature[118], according to the applicable legal texts there is no legal regime difference between the established rights, edicts, recognized or guaranteed by legal or conventional means (by individual or collective negotiation), because the employer can not waive any of his rights, whatever its origin.

The motivation of this interpretation of Article 38 Labour Code is found in the protection of the employee's rights; in fact, it was shown[119] that these legal provisions represent protective measures for employees, destined to assure the free exercise of rights and legitimate interests to which they are entitled to, under the employment relationships, in order to protect them from any abuses or threats from employers.

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[115] A. G. Uluitu, *Aspecte privind aplicarea art. 38 din Codul Muncii*, in *R. R. D. M* nr. 1/2009, p. 42.
[116] J. Ghestin, *op. cit.*, p. 87.
[117] In this regard, see A. Hurbean , *op.cit.*, p. 30.
[118] I.T. Ştefănescu, *Consideraţii referitoare la aplicarea art. 38 din Codul muncii*, in *Dreptul* nr. 9/2004, p. 81.
[119] The Constitutional Court, decision no. 494/2004, the Official Gazette, Part I, no. 59 of January 18, 2004.

By another decision of the Constitutional Court[120] it is shown that Article 38 of the Labour Code does not infringe the principle of the contractual freedom, because this is not a constitutional principle and, anyway the contractual freedom knows reasonable limits imposed by reasons of protection of some private and public interests. In this context, as it is further specified, the legislative provisions in question represent mandatory rules, ensuring thus social protection measures for persons in disadvantaged economic position. Also, the provisions of Article 38 of the Labour Code do not prejudice to the provisions of Article 16 paragraph 1 of the Constitution of Romania, as they only seek to ensure the equality between the contractors, unequal, *ab initio*, regarding the financial and economic potential. The provisions of the Article 38 do not contravene to the provisions of Article 16 paragraph 2, 3 and 4, Article 30, 40 and 45 of the Romanian Constitution, since their area of impact is totally different, which excludes the possibility of collision between them.

In other words, the legal provisions in discussion should be understood in the sense that the legislator tries to balance the position of the two parties of the individual employment contract, given that, after its conclusion, the employee is subordinated to the employer, his position being one of inferiority. Just that, the provisions of Article 38 corroborated with those of Article 11 of the Labour Code refer both to the moment of the negotiation and conclusion of the individual employment contract when the parties are on positions of legal equality.

In fact, Article 38 of the Labour Code is in obvious contradiction with the current socio-economic reality. So, as long as we consider that we live in a society based on the objective rules of the market economy, one of the principles of the employment right imposes to be the principle of negotiation, and not the promotion of the legal provisions which violate and restrict this principle. We arrive, thus, in the situation in which, seeking the employee's protection from an eventual abusive attitude of the employer, we defend the employee against his own will.[121]

Thus, by the application *ad literam* of these legal provisions it could reach to contrary situations to those wanted to be defended – the impossibility of waiver of a right recognised by the law could cause to the employee a disadvantage materialized in a prejudice – such as the situation of renouncing to a part or to the whole notice by the employee, in order to occupy another job. If, in this case, we accepted that the employee can not waive the right of notice, stipulated by the law into his favour, we should also accept the fact that this could lose a new job, which can be immediately occupied, which, we consider, the legislator did not intend.

Therefore, together with other authors[122], we consider that Article 38 must not be literally, grammatically interpreted, but theologically. So, the legislator did not pursue to forbid any transactions, but only the conclusions of the legal acts by which the employer would waive of his imperative rights provided by law. Consequently, as the legal practice demonstrates too, the conclusion of an agreement in the labour law is fully legal.

Specifically, the prohibition stipulated by Article 38 of the Labour Code does not apply if the employee waive of his partial or total right in change of obtaining an advantage, provided that the waiver does not lead to the right's decrease under the limit set by law. Meanwhile, the prohibition is inapplicable if the employee waive of a right in order to save his individual employment contract, unless it lead to the lowering under the legal limit of the provided right. For instance, it was shown that it is possible the employee's indirect waiver of his rights, by accepting

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[120] Decision no. 356/2005, published in the Official Gazette, Part I, no. 825 of September 13, 2005.

[121] In this regard, also see Al. Athanasiu, M. Volonciu, L. Dima, O. Cazan, *Codul muncii. Comentariu pe articole*, pp. 188-189.

[122] D. Dascălu, M. Fodor, *Unele consideraţii privind competenţa soluţionării conflictelor de muncă şi a litigiilor de muncă. Impactul elementelor de extranietate asupra competenţei soluţionării litigiilor şi conflictelor de muncă*, in *Revista Română de Dreptul Muncii*, no. 1/2004, p. 124.

the increase of his obligations, beyond the limit set by law, unless this situation lead to the lowering of the employee's rights under the limit established by law.[123]

Moreover, the Labour Code regulates in a different way certain institutions of labour right and employees rights.

Thus, if regarding the payment and the right to leave, the Labour Code contains special provisions in this regard, the settlement of non-compete clause has a different legal status.

According to Article 165 Labour Code, the acceptance without reservation of a part of the payment rights or signing the payment acts in such situations can not have the signification of the employee's waiver of the rights that are entitled to him, as provided by the legal or contractual provisions. Even more, Article 139 paragraph 2 expressly states that the right to leave can not form the object of any cession, renunciation or limitation (similar Article 59 paragraph 5 of the National Unique Collective Labour Agreement).

But, the adjustments referring to the non-compete clause represents, in fact, an exception to the provisions of Article 38 Labour Code, meaning that the employee is legally allowed to accept certain waivers of his labour freedom in change of obtaining an additional benefit. This benefit has a material nature, consisting in a non-compete monthly allowance, which the employer obliges to pay to him.

Unlike the employee, the provisions of Article 38 are not incident in the employer's case. Nothing prevents him to waive of his exclusive rights, although the right is provided by a mandatory rule, except the situation in which this waiver would infringe a public interest. If we exclusively refer to the employer financed from budgetary sources, the renunciation is twice limited. Firstly, the waiver can not prejudice the financial resources available to these employers, and secondly, the waiver can not prejudice a public interest.

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[123] In this regard, see O. Macovei, *op. cit.*, p. 80; I. T. Ştefănescu, *op. cit.*, pp. 46, 78-79, 103.