

PRACTICAL CONSIDERATIONS REGARDING THE LIMITED EMPLOYMENT CONTRACT - ESTABLISHING THE LIMITED CONTRACT CLAUSE IN THE CONTRACT

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Abstract

The employment contract is commonly concluded without a limited duration. By way of exception, the employment contract may conclude on a limited duration in cases provided for in art. 83 of the labour Code, with the indication of the employment contract duration.

As we shall see, apart from the clause obligation regarding the limited employment contract duration, the employer is required to classify the employment contract into at least one of the cases laid down in art. 83 of labour Code.

In this regard, apart from the contract duration, the exceptional case under which the contract is entered into must be specified.

Keywords: *employment contract, limited duration, labour Code.*

JEL Classification: [K 31]

1. Introduction

As we all know, the employment contract is generally concluded into an unlimited duration.

This principle is presented not only as a social protection measure of the employee but is also pursuing a stability of the legal employment relationships. The exceptional cases in which a person could be hired based on a limited duration employment contract are established by art. 83 of the labour Code (Țiclea, 2016, p. 387 – 395), (AthanasIU & Vlăsceanu, 2017, p. 147).

Unlike the unlimited duration employment contract, in the limited (Panainte, 2017, pp. 271 -331) duration employment contract we must specifically mention its duration and, as we shall see, we must identify the legal basis for entering into the employment contract, in other words, the limited duration employment contract must be classified into at least one of the

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exceptional cases laid established by art.83 of the labour Code. Although the text of art.82 alin 2. of the labour Code specifically provides a way of mentioning the contract duration, these provisions corroborate with the provisions of Order 64/2003 for approval of the draft for the employment contract. According to this Order, one is required to specifically mention at letter C point b) the beginning and the ending date of the activity.

Regarding the text at point a), it will be cut with a horizontal line. In case the duration of the employment contract is not mentioned, we conclude that the provisions from art.57 alin. 4 of the labour Code („If a clause is affected by nullity because it establishes rights or obligations for employees that are in breach of mandatory statutory rules or applicable collective labor agreements, it is legally replaced by the applicable legal or conventional provisions, with the employee entitled to damages”) corroborated with art. 12 alin. 1 of the labour Code become applicable, which means the contract was entered into on an unlimited period.

The maximum duration of an individual limited duration employment contract is 36 months. However, according to art.82 (2) of the labour Code, the same parties can enter into successively not more than 3 limited employment contracts (Radu, 2011, p. 36).

Limited employment contracts entered into effect within 3 months from termination of another limited duration employment contract are considered successive and cannot have a duration longer than 12 months each.

Therefore, totalling the duration of the 3 limited duration employment contracts, it appears that two parties may enter into not more than 3 employment contracts, thus the total duration being 60 months (the contract entered into for 36 months, as well as the possibility to enter into 2 other successive contracts for 12 months maximum).

We observe that, in this case, the duration of the employment contract is correctly determined, with a specific duration, meaning both the date of starting and ending the activity.

Exceptionally, regarding the provisions in art. 84(2) of the labour Code, the duration of the employment contract is uncertain, an aspect that we are going to analyze in the following.

2. Cases for concluding a limited employment contract (Ștefănescu, 2014, pp. 517-523); (Gîlcă, 2015); (Roș, 2017, pp. 174-177)

According to provisions in art.83 of the labour Code, the employment contract can be concluded for a limited duration only in the following cases (Țiclea, 2016, p. 387-395); (Panainte, 2017, pp. 192-195); (Dima, 2017, pp. 52-66):

a) replacing an employee in case of suspension of there his/her contract, except for when the employee is striking;

b) temporary growing or changing the employer’s activity structure;

“Increasing the activity mentioned in the art. 83 lett. b) of the labour Code is an unpredictable one, beyond the ability of anticipation of every diligent employer. In particular, there cannot be claimed a temporary increase as stipulated in legislature since the length of the limited duration employment contract was extended to 5 years.

A court cannot avoid, while verifying the fulfilment of the legal conditions mentioned earlier, the overall behaviour of the employer, who initially understood to hire the plaintiff through a work agency in order to eventually directly sign a work agreement, the latest renewal taking place during the ongoing trial, even though a decrease in invitations to tender/activity has been invoked.

The caller’s product sales’ changing values are undeniable, but the activity’s inherent fluctuation specific to an employer is not one that leads to an application of art. 83 letter b of the labour Code, just as any decrease in activity does not automatically lead to a dismissal of staff.

In other words, in an area such as the applicant’s, there is a possibility (also considering the data indicated on appeal concerning delivery deadlines of 16 days, 110 days, 85 days, etc.) of monthly/quarterly major fluctuations in orders. In this context, there would be required either a dismissal of staff or hiring new employees.

This is neither practically nor legally possible (considering the need for time-consuming formalities, the need for training specialists/earning certificates/qualifications).

That’s why, not the sales fluctuation in itself, but their growth, is likely to lead to the belief that art. 83 lett. b of the labour Code is applicable. Therefore, the court cannot retain such a character for a period of approximately 5 years” (Bacau, Appeal Court decision no. 252/2016, 2016); (www.avocat-dreptul-muncii.eu, n.d.)

c) carrying out seasonal activities;

d) in certain situations where it is entered into a contract based on legal provisions issued with a purpose to temporarily favour certain categories of unemployed people;

e) hiring a person who, within 5 years from the date of employment, meets the conditions of retirement regarding the age limit;

f) occupying an eligible position in unions, employers’ organisations or non-governmental organisations, during the term of office;

g) hiring retirees who, according to the law, can add a salary to their pension;

h) in other cases expressly provided by special laws or for conducting certain constructions, projects or programmes.

Regarding special laws, we mention (Țiclea, 2015, pp. 143-144); (Preduț, 2016, p. 225):

Law no. 72/2007 on stimulating the employment among pupils and students offers the possibility to hire pupils/students during summer holidays. Therefore, from a practical point of view, the employer will require a written certificate from the future employee's education establishment. We appreciate that this certificate must contain information regarding identification information about the establishment and its vacation period. Thus, the employee will be hired for a limited duration during the summer holidays.

Law no. 258/2007 on pupils and students practical training provides that the training partner is able to hire the trainee (pupil/student) based on a limited duration employment contract during the practice.

Regarding the limited duration employment contract for conducting constructions, projects or programmes, in the employment contract it must be mentioned the construction, project or programme. The project/programme should be proven through justifiable documentation, documents that are required to include the duration of the project/programme, following that the employee would be hired during this time.

Of course, there is also the possibility of extending the project/programme, in which case there is a possibility of signing an employment contract addendum. It is essential that the project/programme has a determined nature that can be proven with documents.

“By examining the employment contract, it does not result that the construction, project or programme is mentioned in the current matter, in order to apply the exceptional situation of art.81 lett. e) of the labour Code, which allows entering into a limited duration employment contract.

The unilateral act of the employer, through which it was decided to end the appellant's employment contract, presumed to be signed for unlimited duration, is facing nullity” (Iași Appeal Court, Decision no. 733/2008, 2008).

Concluding a limited duration employment contract in order to replace an employee that has its employment contract suspended (art. 83 lett. a) in conjunction with art. 84 (2) and art. 56 lett. i) of the labour Code) (Athanasiu & Vlăsceanu, 2017, p. 147).

In order to find ourselves in this situation our assumption would be that this employment contract is to be concluded for replacing an employee (the holder of the role) who already has a suspended employment contract. Practically, most of the times we find this situation in case of maternity leave, parental leave up until 2 years or 3 years in case of a disabled child, or, recently in Romanian law, cases of employment contract suspension by the employee's initiative when entering the adjustment period (Roș, 2017, pp. 187-193).

Therefore, in order to find ourselves in the situation of entering into a limited duration employment contract for replacing an employee with their employment contract suspended, the assumption would be: by the start date of

the limited employment contract, the other employment contract (the holder of the role) has already been suspended.

Therefore, we consider that we have 2 cumulative conditions:

1. the employment contract of the holder of the role must be suspended
2. when entering into an employment contract under art. 83 lett a) in conjunction with art. 84 (2) of the labour Code, in the employment contract there must be expressly mentioned that fact that the contract is signed while suspending the holder of the role's employment contract - replacing an employee whose employment contract is suspended.

Moreover, for the purpose of identification, we appreciate that is necessary that there is either mentioned the holder of the role's name or their contract number. In the lack of these mentions it is rather difficult for the holder of the role to be identified, for instance if there are, at the same time, more employees who are holders of their roles have their employment contracts suspended and who have the same roles (for example, 3 roles of economists).

If we carefully analyze the provision "The employment contract can only be entered into for a fixed period only in the following cases: we note that the legislator expressly mentions" The individual labor contract can only be entered into [...]".

Interpreting this provision, we clearly notice from the phrase "can be entered into" the fact that the basis of the limited employment contract (art. 83 lett. a) in conjunction with art. 83 (2) of the labor Code) must be mentioned in the employment contract itself at the time of concluding the employment contract, namely, at the date of signature and not subsequently by a contract addendum.

Therefore, we consider that a limited duration employment contract which has not been concluded from the beginning with the express mention of the ground of art. 83 lett. a in conjunction with Article 84 (2) of labor Code, cannot be amended by an addendum in order to transform it into a limited employment contract on the basis of art. 83 lett. in conjunction with Article 84 (2) of labor Code.

If the employer wishes to continue the collaboration with the hired employee under a limited employment contract on the basis of art. 83 lett. a) corroborated with art. 84 (2) of labor Code, we appreciate that we can: either conclude an additional act whereby the duration of the employment contract will be indefinite or a new definite or indefinite employment contract can be concluded.

3. Termination of the individual labor contract concluded on a fixed term

The employment contract concluded for a limited period is terminated, *de iure*, on the date of expiration of the employment contract duration, according

to the provisions of art. 56 (1) lett. i) of the labor Code (Țiclea, 2018, pp. 80-85). Of course, a limited duration employment contract may also cease before the expiry of the period for which it was entered into either on the initiative of the employer, the employee, or by the agreement of the parties or in the cases stipulated in art. 56 of the labor Code.

If the limited duration employment contract is entered into in order to replace an employee whose individual employment contract is suspended, the duration of the contract shall expire at the termination of the reasons which led to the suspension of the employment contract of the post holder. For example, when the post holder returns in the workplace.

Conclusions

The employment contract is being concluded, as a rule, for an unlimited period. This principle is presented both as a social protection measure for the employee on one hand and on the other hand it aims at stability of the legal relations of labor.

Moreover, the conclusion of the indefinite duration employment contract reduces the possible cases of unemployment (Roș, 2018, pp. 66-68).

In order to conclude an employment contract for a limited period, the employer has to determine whether the situation for which the employment contract is to be concluded qualifies for at least one of the situations stipulated in art. 83 of labor Code, to mention the duration of the contract as well as the legal basis provided by art. 83 of labor Code. All these aspects should be mentioned in the employment contract itself.

From our point of view, in the absence of such mentions: either the legal basis either the duration, the employee has the possibility to appeal to court requesting the nullity of the clause on the fixed duration of the employment contract and also requesting its replacement with an indefinite clause according to art. 57 (4) of labor Code in conjunction with Art. 12 (1) of labor Code.

We appreciate in the absence of an express mention of the employment contract duration or the absence of basis for which it was signed (mentioning in concrete terms according to art. 83. of the labour Code), the court will give earning for the employee party because the employer was not of good faith when the employment contract was concluded and did not correctly and completely inform the employee regarding the basis for signing the employment contract and, from another point of view, because the employees could not defend themselves since they cannot build their defence if they are not aware of the legal basis for which the contract was signed.

Moreover, the court cannot investigate the merits of the litigation because it has no way of verifying whether there was any exceptional case covered by

art. 83 of the labour Code, as long as this certain exception is not mentioned in the employment contract itself.

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