

Specifics of the employment process in the public sector

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Abstract

The labour legislation applicable in public sector is very different from the one applicable in private sector. Unlike the private sector where the market is the most efficient regulator and sanctions all errors made by the assessor, in the public sector there isn't always a feed-back from the economic realities that may prove the accuracy and the efficiency of the assessment. Consequently, the law goes further on and imposes requirements, deadlines and procedures. While the private sector enjoys a certain flexibility regarding the assessment of the staff, in order to adjust it to the requirements of the economic realities, in the public sector, flexibility can lead to manifestations of subjectivism and arbitrariness. On the other hand, the excessive amount of regulations applicable in public sector may provide versatile and even contradictory results.

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1. Preliminary considerations

In the public sector, the regulations governing the labour relations practically „dub” the Labour Code as the labour legislation in the public sector does not coincide with the legislation in the private sector. The main specifics of the public sector labour regulations are:

➤ *very accurate and detailed provisions.* Since market performance (the most useful assessment criterion) does not apply in the public sector, manifestations of subjectivism of the heads of public institutions are most likely to appear. Consequently, regulations are stricter in order to hinder these manifestations;

➤ *limited individual negotiation.* In the case of public servants who do not conclude a labour agreement, individual negotiation is excluded; they are appointed under a unilateral administrative act. In the case of the staff hired under agreement, negotiation is extremely limited. Consequently, rules are also detailed in their case;

➤ *limited collective negotiation.* Both the collective labour agreements concluded by the staff hired under labour contracts and the collective labour agreements concluded between institutions and public servants have a very limited margin since they can only stipulate the rights of the employees within the limits stipulated by the legislation in force for their category of staff.

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Against these legislative specifics², the rules of the Human Resources Management are different in the public sector. The managerial prerogative of the head of the public institution is more limited than in the case of the commercial company while responsibility is higher.

2. Categories of staff

The public sector staff includes the workers hired under individual labour contract in public institutions, the dignitaries, the public servants and the public servants with special status.

a) If the employer is a public institution, the employees shall be called *public employees*³.

The notion of staff hired under labour agreement is synonymous with the notion of employees and it is used in normative acts regarding public institutions to make the difference between employees (who conclude labour agreements) and public servants. For instance, Law no 188/1999⁴ stipulates that its provisions shall not apply to the employees hired under labour agreement in public authorities and institutions and other staff categories that do not have public power prerogatives. The individuals who hold these positions are not public servants but employees.

Some public employees are subject to special regulations that derogate from the Labour Code. Thus, the teaching staff that is subject to the Law no 1/2011 of national education⁵.

Beyond these special regulations, most public employees are subject to the provisions of the Labour Code⁶ and of the Law of social dialogue⁷, and only a few aspects – like salary or limits of collective negotiation – are subject to derogatory norms.

b) A definition of the *workers* can be found in the Law no 62/2011 of social dialogue. Thus, a worker is a physical person who is a party in an individual labour contract or in an administrative relation and who performs work for and under the authority of an employer and enjoys the rights stipulated under the law, as well as the provisions of the collective labour contracts or agreements applicable.

Consequently, the notion of a worker is broader than the notion of employee, including also the individuals who are not hired under a labour contract but under an administrative act (public servants).

² Regarding the usefulness of the comparative analysis of the legal labour relations in the private sector, and in the public sector, I. T. Ștefănescu, *Tratat teoretic și practic de drept al muncii*, Universul Juridic Publishing House, Bucharest, 2012, p. 39.

³ Regarding the public law nature of the labour law on the public employees, see, Al. Țiclea (ed.), *Dreptul public al muncii*, Wolters Kluwer Publishing House, Bucharest, 2010, p. 26.

⁴ Regarding the statute of public servants, republished in the Romanian Official Gazette, Part I, no. 365 of 29 May 2007, modified.

⁵ Published in the Romanian Official Gazette, Part I, no 18 of 10 January 2011.

⁶ Law no 53/2003, republished in the Romanian Official Gazette, Part I, no 345 of 18 May 2011.

⁷ Law no 62/2011, published in the Romanian Official Gazette, Part I, no 322 of 10 May 2011.

Public servants are similar to employees from many points of view; they receive salaries, they have holidays, they have 8 hours per day working time etc. However, they are different from the employees because of a major difference: they do not negotiate and they do not conclude a labour contract but they are appointed on their positions as representatives of the executive power due to the administrative relations they enter. According to art. 2 in the Law no 188/1999 regarding the Status of Public Servants, the public servant is the individual appointed, under the law, on a public position. The public position is the set of attributions and responsibilities established under the law, in order to achieve the public power prerogatives of the central public administration, of the local public administration and of the autonomous administrative authorities.

c) The broader notion is the notion of *staff paid from public funds* – including public employees and public servants and other staff categories who perform their activities under various normative acts. This notion includes, among others:

- the military, whose statute has been approved under the Law no 80/1995⁸;
- magistrates, whose statute is governed by the Law no 303/2004 regarding the statute of judges and prosecutors⁹;
- legal advisors who, according to the Law no 514/2003 regarding the profession of legal advisor¹⁰, can be employees as well as public servants;
- police forces, public servants with special statute, whose statute is governed by the Law no 360/ 2002, regarding the statute of the police person¹¹ etc.

We have therefore the following inclusion relation:

public employees < public workers < staff paid from public funds
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The public staff perform their activity under legal relations that arise either from a document of appointment on the respective position or from a labour contract. Thus, the relations generated from the conclusions of a labour contract are

⁸ Published in the Romanian Official Gazette, Part I, no 155 of 20 July 1995, modified, the latest modification is the Law no 53/2011 for the modification and completion of the Law no 80/1995 regarding the statute of the military, published in the Romanian Official Gazette, Part I, no 290 of 26 April 2011.

⁹ Republished in the Romanian Official Gazette, Part I, no 826 of 13 September 2005, modified, the latest modification is the Law no 24/2012 for the modification and completion of the Law no 303/2004 regarding the statute of judges and prosecutors and the Law no 317/2004 regarding the Higher Council of Magistrates, published in the Romanian Official Gazette, Part I, no 51 of 23 January 2012.

¹⁰ Published in the Romanian Official Gazette, Part I, no 867 of 5 December 2003, modified.

¹¹ Published in the Romanian Official Gazette, Part I, no. 440 of 24 June 2002, modified, the latest modification is the Emergency Ordinance no 107/2011 for the modification of the Law no 360/2002 regarding the Statute of the Policeman, published in the Romanian Official Gazette, Part I, no 861 of 7 December 2011.

called employment relations, unlike the relations under which public servants work which are called administrative labour relations.

According to art. 4 para. (1) in the Law no 188/1999, administrative labour relations arise from and operate under an appointment administrative document, issued under the law.

There is a difference in terms of collective relations as well: public servants conclude collective agreements while employees conclude collective contracts.

While in terms of legal relations, there is a distinction between employment relations and administrative labour relations, in terms of collective labour relations there is also a difference between employees and public servants. Thus, according to the Law of social dialogue no 62/2011:

- the collective labour contract is the written convention concluded between the employer or the employers' organisation and the representatives of the employees which define the clauses regarding the rights and the obligations arising from the labour relations, while
- the collective labour agreement is the written convention concluded between the unions' organisation of the public servants or public servants with special statute, their representatives and the representatives of public authorities or institutions.

3. Recruitment and selection in public institutions

In addition to the general requirements needed for the conclusion of a labour contract, in the case of some public employees, specific requirements, included in derogations from the labour law, must be met such as:

- a) education;
- b) traineeship;
- c) number of years of professional experience in general or in that specific field etc.

Regarding the traineeship, its duration is stipulated for each category of staff¹². For instance, in case of teaching staff, the law of national education no 1/2011 stipulates in art. 248 that in order to hold a teaching position, a practical traineeship of an academic year in an education institution shall be performed, on a teaching position corresponding to the educational level of the person, under the supervision of a supervisor teacher.

While in the private sector, interviews are used to check the professional skills of the candidates, as well as a probation work period, in the public sector, competition is used to select candidates.

The competition¹³ is the compulsory means to select and hire employees in public institutions and authorities and other public organisations. If there is only

¹² Regarding traineeship, for various categories of staff, see I. T. Ștefănescu, *cit.*, pp. 263-264.

¹³ For details regarding the competition, see R. Dimitriu (ed.), *Consilier – Codul muncii și toate reglementările uzuale*, Rentrop/ Straton Publishing House, Bucharest, 2012, p. C 40/001-004.

one candidate, he/she shall be hired after an exam. According to art. 30 para. (4) in the Labour Code, the requirements to organize and carry out the competition and the exam shall be defined by regulations approved by Governmental decision.

Such regulations have been finally approved (the previous ones dated back to 1993) by the Governmental Decision no 286/2011¹⁴. It is the framework regulations regarding the general requirements to fill in a vacancy or temporary vacancy according to the position stipulated in the contract and to the promotion criteria onto professional levels applicable to the staff hired under contracts in the public sector and paid from public funds.

The regulations apply to staff hired under contracts in:

a) public institutions and authorities: Parliament, Presidency, courts, Government, ministries, other bodies of the central public administration, authorities of the local public administration, other public authorities, autonomous administrative authorities, and institutions subordinated to them, financed from the public budget, local budget, public social insurance budget, special funds;

b) public institutions and authorities financed from their own revenues and from subsidies from the public budget, local budget, public social insurance budget, special funds;

c) public institutions and authorities entirely financed from their own revenues;

d) public institutions and authorities whose heads are individuals hired under a contract other than the individual labour contract.

The regulations shall not apply to:

- the National Bank of Romania,
- the National Securities Commission,
- the Oversight Commission for Insurance,
- the Oversight Commission for Private Pensions,
- public institutions and authorities that have regulations and normative acts specific for their field of activity regarding the hiring and promotion of the staff hired under contract.

The candidates to the competition to fill a vacancy or a temporary vacancy can be any individual who meets the general requirements and the specific requirements stipulated in the job description. For instance, the individual:

a) is a Romanian citizen, EU citizen or a citizen of other countries of the European Economic Space and resides in Romania;

b) can speak Romanian and can write in Romanian;

c) has the minimal age as required by the law;

d) has full ability to exercise his duties – is at least 18 years of age. For certain positions, the minimal age is older, especially when there are requirements of education or traineeship;

e) has good health to fill the position, certified by a medical certificate issued by his doctor or by relevant medical units;

¹⁴ Published in the Romanian Official Gazette, Part I, no. 221 of 31 March 2011.

f) meets the requirements regarding education and, as the case may be, professional experience or other specific requirements for the respective position;

g) has no criminal record including crimes against humankind, against the state or authorities, related to his job, that may prevent justice, forgery or corruption or any other crime perpetrated with intention, that may render the individual incompatible with the position, except for the case where the individual has been rehabilitated.

The persons designated to be part of the competition committees or of the committees set up to solve complaints shall meet the following requirements:

a) to have an acknowledged moral quality;

b) to hold a position that is similar or equivalent to the vacancy for which the competition takes place;

c) not to be in a situation of incompatibility or conflict of interests.

A person who had been sanctioned for reasons of discipline and the sanction has not been removed from his/her record, under the law, shall not be a member of the competition committee or of the committee to solve complaints.

Currently, according to art. 264 para. (3) in the Labour Code, the sanction for reasons of discipline shall be lawfully removed from one's record within 12 months since the date when the sanction was enforced, unless the employee is enforced another sanction for reasons of discipline within this period of time. The removal of the sanction enforced for reasons of discipline can be certified by a written decision of the employer.

A problem is the moment from which the 12 month period starts. It is not provided that the period starts at the moment when the employee is informed about the sanction (as it may be logical, since this is the moment from which the period of time during which the sanction can be contested in court starts), but from the moment when the sanction is enforced. Consequently, the moment differs depending on the sanction enforced.

For instance, the period of time starts from the moment when the salary is actually cut with 10%, if this is the sanction enforced. If the sanction is a warning, the moment of its enforcement coincides with the moment when it is notified and this is the moment from which the 12 month period starts. If the sanction enforced is reducing someone to a lower rank, the enforcement starts the moment when the employee is transferred to the lower position.

4. Filling vacancies

As mentioned before, filling a vacancy or a temporary vacancy takes place after a competition or exam, for the position already existing in the organizational chart. In case of admission to fill a temporary vacancy, the labour contract shall be concluded for the period of the absence of the holder of that position.

What are the requirements to fill vacancies in the public sector?

Here is the evolution of the legislation applicable to employees of public authorities and institutions.

The Governmental Emergency Ordinance no 34/2009 regarding the budget adjustment for 2009 and regulations regarding some financial-fiscal measures¹⁵, stipulated in art. 22 that, „starting with the date when this ordinance enters into force, the competitions and exams to fill vacancies in public authorities and institutions shall be suspended”. However, the main budget authorizing managers, in well justified cases, may approve the filling of a maximum of 15% of the total vacancies arising after the entering into force of the emergency ordinance (after summer 2009), only within the limits of the staff-related expenses already approved in the budget.

The Emergency Ordinance no 1/2010 regarding reemployment on positions of certain categories of employees in the public sector and their salaries, as well as other budgetary measures¹⁶ extended the period of interdiction to fill vacancies until 31 December 2010.

Later on, the Emergency Ordinance no 109/2010 regarding some financial-budgetary measures¹⁷ extended the period of interdiction to fill vacancies in the public sector until 31 December 2011.

The interdiction to hire caused significant malfunctioning in public institutions. If the only accountant of an institution retired, the financial-accounting activity was blocked. If the technician resigned, the technical activity stopped in the entire institution. The interdiction to hire caused hilarious situations where institutions operated without a secretary, cleaning staff or IT expert etc. Thus, the modification of these regulations became urgent.

The Emergency Ordinance no 23/2011 for the modification and completion of art. 22 in the Governmental Emergency Ordinance no 34/2009 regarding budgetary adjustment for 2009 and regulations regarding certain financial-fiscal measures¹⁸ maintained the interdiction to hire but extended the range of exceptions. At present, the main budget authorizing managers in local authorities can approve the filling of the vacancies that are unique positions in their local public institutions and authorities after competition or exam if they do not exceed the staff-related expenses approved in the budget.

¹⁵ Published in the Romanian Official Gazette, Part I, no. 249 of 14 April 2009, approved by the Law no 227/2009 published in the Romanian Official Gazette, Part I, no. 402 of 12 June 2009.

¹⁶ To be abrogated by the Law framework no. 284/2010 regarding the unified salaries of the staff paid from public funds, published in the Romanian Official Gazette, Part I, no. 877 of 28 December 2010.

¹⁷ Published in the Romanian Official Gazette, Part I, no. 846 of 16 December 2010, approved with modifications by the Law 70/2011, published in the Romanian Official Gazette, Part I, no. 396 of 6 June 2011.

¹⁸ Published in the Romanian Official Gazette, Part I, no. 168 of 9 March 2011, approved with modifications by the Law no. 14/2012, published in the Romanian Official Gazette, Part I, no. 20 of 10 January 2012.

A unique position is:

- a) a position whose attributions, in terms of contents and nature, or responsibilities, does not exist elsewhere in the organisational chart; or
- b) a position among the positions in departments where only vacancies exist.

Law no 283/2011¹⁹ extended until 31 December 2012 the interdiction to hire in the public sector and the exceptions above mentioned.

It is the third extension of the interdictions and we have reasons to believe it is not the final one.

5. Promotion in the public sector

The Decision no 286/2011, for the approval of the Framework regulations regarding the general principles to fill vacancies or temporary vacancies corresponding to positions filled under contract and the promotion criteria onto professional hierarchy of the employees hired under contract in public sector and paid from public funds stipulates the requirements to organize the competition to fill vacancies and the requirements to promote onto the professional hierarchy the employees hired under contract in public sector and paid from public funds.

Promotion ensures the career development of the staff hired under contract by upgrading to a higher professional rank, level or position. Promoting the individuals hired under individual labour contracts by upgrading to higher professional ranks or levels usually takes place in case of a vacancy or temporary vacancy; if there is no such position, the position in the organisational chart held by the individual to be promoted is turned into the next higher position.

Promotion by professional ranks or levels of the staff hired under contract in the public sector takes place after an exam. The exam organized in order to promote to higher professional ranks or levels the staff hired under contract consists in a written test and a practical test, as the case may be, and an interview with the exam board.

6. Assessment of the performance of the public employees

Law no 40/2011 modified the Labour Code by introducing professional assessment criteria in the basic clauses of the individual labour contract (art. 17 para. 3 letter e). The assessment of the employees started to be included in the internal regulations (art. 242 letter i) and it is a requirement for any decision to dismiss the employee for reasons of professional inappropriateness.

In the case of the public employees, the system had been already in place. Public employees were regularly assessed and the assessment was the basis for their remuneration.

¹⁹ Regarding the approval of the Governmental Emergency Ordinance no. 80/2010 for the completion of art. 11 in the Governmental Emergency Ordinance no. 37/2008 regulating financial measures in the budgetary field, published in the Romanian Official Gazette, Part I, no. 887 of 14 December 2011.

The assessment of the public employees is done in compliance with the Law framework no 284/2010 regarding the unified salaries of the staff paid from public funds²⁰, and the professional assessment of public servants complies with the Decision no 611/2008 for the approval of the norms regarding the careers of public servants²¹.

The professional assessment of the staff paid from public funds has some specifics arising from the fact that the level of subjectivity of the assessor can be higher. Unlike the private sector where the market is the most efficient regulator and sanctions all errors made by the assessor, in the public sector there isn't always a feed-back from the economic realities that may prove the accuracy and the efficiency of the assessment. Consequently, the law goes further on and imposes requirements, deadlines and procedures. While the private sector enjoys a certain flexibility regarding the assessment of the staff, in order to adjust it to the requirements of the economic realities, in the public sector, flexibility can lead to manifestations of subjectivism and arbitrariness.

Legally speaking, the main objectives of assessing the staff paid from public funds are promotion and salaries, expressly stipulated in the Law – Framework no 284/2010 to which the general objectives of any assessment must be added. However, sometimes, the assessment of the employees cannot be used in the public sector with the same efficiency as in the private sector. For instance, although the assessment of the staff may find discrepancies between job descriptions and economic realities, the funds authorizing manager cannot adjust the job descriptions because they have been approved by normative acts.

The starting point in assessing the public employees is the Law – framework no 284/2010. Professional activity is assessed annually and after assessing individual professional performance, the head of the public institution, upon proposal of the hierarchical chief, gives scores: "very well", "well", "satisfactory" and "not satisfactory".

The following criteria are taken into account:

- Knowledge and experience;
- Complexity, creativity and diversity of activities;
- Judgement and impact of decisions;
- Influence, coordination and supervising;
- Contacts and communication;
- Working conditions;
- Incompatibilities and special regimes.

The main budget authorizing managers define the criteria to assess individual professional performance and can define also other assessment criteria depending on the specifics of the field of activity. The main budget authorizing managers define their own selection criteria, according to the requirements of the position, in addition of the selection criteria stipulated by the law-framework.

²⁰ published in the Romanian Official Gazette, Part I, no. 877 of 28 December 2010.

²¹ published in the Romanian Official Gazette, Part I, no. 530 of 14 July 2008.

For instance, such additional criteria are stipulated in the Order of the Ministry of Administration and Interior no 94/2011, regarding the assessment of the professional performance of the staff of the Ministry of Administration and Interior²².

The assessment of the public staff is reflected by a score which can be further on contested by a contesting legal procedure to a commission set up at a higher level. There is a distinction between the score given and the score approved.

Unlike the private sector where the aim of the assessment is not salaries, this is the main aim of the assessment in the public sector. Actually, the approach is different: in the private sector, salaries are the result of collective and especially individual negotiation, while in the public sector such a negotiation is not possible, since the salary is defined by a normative act within the limits of the approved budget.

Consequently, a set of transparent and universal criteria are needed in the public sector to establish the salaries of the staff. According to art. 9 para. (1) in the Law - framework no 284/2010, salaries remunerate public employees according to the responsibilities of the positions, the nature of the work, the amount of work and the quality of the work performed, social importance, the concrete circumstances of the work, the results, the assessment criteria for the respective category of staff. This is not the case in the private sector where salaries are governed by the principle of confidentiality and criteria are not the same for the entire staff or from one moment in time to another.

Thus, the objectives of the assessment in the public sector and private sector are different. In the private sector, once the salary defined through negotiation, it can be modified only through mutual consent (additional deed signed by both parties). In the public sector, salaries are defined and modified by normative acts, so transparency is (or should be) the key word. That is why the assessment criteria are defined for the staff paid from public funds in the salaries law while in the private sector assessment can lead only to bonuses and incentives, not to the adjustment of the salary per position.

One of the assessment criteria for the staff paid from public funds is the results achieved and this is a special criterion from many points of view.

To note, above all, that such a criterion does not turn the employee's obligation of means into an obligation of result. This criterion shall never be taken into account individually but separately with other assessment criteria, while salaries, promotion, staff selection and staff dismissal cannot be decided upon exclusively by taking into account if the criterion is met or not. If the criterion taking into account whether a result has been achieved or not could be decisively considered in the assessment of the employee's work, then the subordination nature of the work relation and of the job would lose its contents. In the public sector as well, the employer preserves one's management and control powers and takes the risk of not achieving the result aimed at after the conclusion of the legal relation.

²² Published by the Romanian Official Gazette, Part I, no. 341 of 17 May 2011.

The second reason that makes the criterion of results important is the provisions of art. 23 in the law – framework no 284/2010, stipulating that the budget authorizing managers can give monthly bonuses of 2% of total expenses incurred with salaries of the staff allocated to the organisational chart, without exceeding the approved budget. Bonuses can be given during the year to employees who achieved or were directly involved in achieving special results in the institution.

In addition to the regular assessment, public employees shall be assessed also by taking into account their results in order to give them bonuses. Individual bonuses are established by the budget authorizing managers within the limits of the funds allocated in this respect by the main budget authorizing manager and within the limit of two monthly salaries per year.

For certain categories of public staff, the assessment of their performance is subject to regulations that derogate from the Labour Code and from the Law – framework no 284/2010. It is therefore, a subsequent derogation, as the law – framework appeared as a special law as against the Labour Code but as a general law as against other regulations regarding the salaries of certain categories of public staff.

For instance, according to art. 303 in the Law of national education no 1/2011, the results and the performance of the teaching staff and of the research staff in teaching and research activities in universities shall be assessed regularly every 5 years the latest. This assessment shall be done according to a methodology approved and applied by the Senate of the University. The assessment of teachers done by students is compulsory. The outcome of the assessment is public information. The salaries of the teaching staff and of the research staff shall be established by taking into account also their performance, under the law. The labour contracts of the teaching staff and of the research staff include minimal standards for the results in teaching activities and research activities and clauses regarding the termination of the contracts if such minimal standards are not complied with.

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