Considerations concerning the prohibition of use of the probation period in the individual labor contract (according to the provisions of article 33 of the Romanian Labor Code)

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Abstract

The probationary period is the most appropriate way of verifying the professional skills - among the possible ones - given that during the performance of the individual labor contract, the skills of the employee can be tested. The objective of this study is to analyze the ban on the use of the probation period in the context of art. 33 of the Labor Code. Thus, we propose to discuss relatively the employer's ability to employ probationers through successive employment in a maximum of 12 months. We appreciate that it is useful to establish the practical implications of the legal provisions outlined above - in the context in which the probationary period is the most useful way of prior checking of the persons applying for employment.

Keywords: *individual employment contract; probation period; denial clause; verifying professional skills; successive hiring.*

JEL Classification: K31

1. Introductory issues

A). a). In accordance with the provisions of art. 29 para. 2 of the Labor Code, the ways in which the pre-qualification of the professional and personal skills of the persons applying for employment is established by the applicable collective labor contract, the status of personnel – professional or disciplinary – and by the internal regulation, insofar as the law does not provide otherwise.

For the purpose of checking the employee's skills, upon the conclusion of the individual labor contract, a probation period[2] – a waiver clause[3] – which will be the object of the information provided in art. 17 par. 2 letter n) of the Labor Code.

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[2] The duration of the probationary period is regulated differently, as follows: in the case of an individual employment contract concluded for an indefinite duration, according to art. 31 par. 1 of the Labor Code, the probation period shall be no more than 90 calendar days for the execution functions (qualified or unqualified) and no more than 120 calendar days for the managerial positions; when talking about an individual contract of employment concluded on a fixed term, the legal regulation contained in art. 85 of the Labor Code stipulates the following terms: 5 working days for an individual work contract less than 3 months; 15 working days for a duration of the individual work contract between 3 and 6 months; 30 working days for an individual contract of employment longer than 6 months; 45 working days in the case of employees in management positions for a period of individual work contract longer than 6 months.

[3] To be seen I.T. Ștefănescu, *Tratat teoretic și practic de drept al muncii*, fourth edition, Universul Juridic Publishing House, Bucharest, 2017, p. 315-321.

b). As can be seen from the legal provisions shown, as a rule, the probationary period is not binding.

However, as an exception, it is mandatory, according to art. 31 par. 2 of the Labor Code, in the case of persons with disabilities. The 30-day term stipulated by art. 31 par. 2 of the Labor Code was increased to 45 working days by art. 83 par. 1 letter d) of Law no. 448/2006 on the protection and promotion of the rights of persons with disabilities[4], which is a special regulation according to the Labor Code[5]. Thus, when employing people with disabilities, the professional skills check is carried out exclusively by the probationary period of at least 45 working days.

c). During the probation period the employee benefits from all the rights and has all the obligations stipulated in the labor law, in the applicable collective labor contract, in the internal regulations, as well as in the individual labor contract (art. 31 paragraph 4 of the Labor Code).

The probationary period is the length of service.

d). According to art. 32 par. 1 of the Labor Code, only one trial period (between the same persons, for the same job) can be established during the execution of an individual employment contract. Subsequently, if the person concerned moves to another job, but in the same profession, a new probation period can not be established.

By exception – according to art. 32 par. 2 of the Labor Code – the employee may be subjected to a new probationary period if: he/she starts with the same employer in a new position/profession or profession; is going to work in a workplace with severe, harmful or dangerous conditions.

e). During the probationary period or at the end of the probationary period, the individual employment contract may be terminated, without written notice, without notice, at the initiative of either party, without the need for a statement of reasons (art. 31, paragraph 3, of the Labor Code).

Decision no. 334/2012[6] of the Constitutional Court stated that, ”in order to verify the employee's professional skills, the legislator also introduced a special condition applicable to the employment relationship thus concluded, namely the notification provided in art. 31 par. (3) of the Labor Code, a notification that does not have to be motivated and which equates to the fact that the employee's professional skills do not correspond to the requirements of the job. It is a discretionary decision taken by the employer, who has a position that involves taking such a decision. Moreover, the contractual clause in question encourages the continuous professional development of employees, being agreed and agreed by both parties at the conclusion of the contract".

As a consequence, it can be seen that the benefit of including the probationary period is that either party may terminate the contract. By this simplified way, the contract ceases without the need to motivate and without observing a notice period.

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[4] Republished in the "Official Gazette of Romania", Part I, no. 1 of 3 January 2008.
[5] See to that effect I.T. Ștefănescu, *op. cit.*, p. 322-323.
[6] Published in the "Official Gazette of Romania", Part I, no. 358 of 28 May 2012.

2. Aspects regarding the probation period – in the sense of art. 33 of the Labor Code

A). The Labor Code resorts to the setting up of some complaints regarding the use of the probation period, as follows: 74 par. 1 of the normative act mentioned above, if, within 45 calendar days from the date of collective redundancies, the employer resumes the same activities whose termination led to the dismissal, the dismissed have the right to be re-hired with priority being given to the post re-established in the same activity, without examination, contest or probation period; according to art. 64 par. 1 of the same normative act, if the dismissal is ordered for the reasons provided in art. 61 letter c) (medical) and letter d (professional misconduct) as well as if the individual labor contract has ceased to exist on the grounds of art. 56 letter e) (due to the admission of the application for reintegration into the position occupied by an employee of an illegally or illegally dismissed person), the employer has the duty of diligence to propose to the employee other vacancies compatible with the vocational training or, as the case may be, work established by the occupational health practitioner. In this case, the use of the trial period is also excluded; the one set forth in the art. 33 of the Labor Code – which will be the subject of the analysis below.

As judiciously emphasized in the legal doctrine[7], we consider that the prohibition to use the probationary period in the above situations results from the lack of guilt of the person concerned at the previous termination of the employment contract.

B). The Romanian legislator's vision was to state – in the art. 33 of the Labor Code – that the period of successive employment of several persons for the same job can not be longer than 12 months.

Against the background of current incidents, it can be argued that the ban on the use of the probation period after the expiry of the 12-month limit requires that the following requirements be met – in our cumulative opinion, namely:

a). The employment must be based on the existence/performance of an individual labor contract – the probation period may be established for the purpose of checking the employee's skills upon conclusion of the individual labor contract (according to art. 31 paragraph 1 of the Labor Code).

Thus, it is necessary to create the possibility of defining in law or otherwise the specific features of the existence of an individual employment contract.

The purpose of this approach is to combat recourse to contractual arrangements that conceal the real legal status – in which case the above-mentioned requirement could not be respected. If one of the persons in question were covered by another type of contract (for example civil: service provision, collaboration), the 12-month limit could no longer be respected.

[7] To be seen I.T. Ștefănescu, *op. cit.,* p. 324.

In achieving this, the International Labor Organization (O.I.M.) adopted, in 2006, Recommendation no. 198[8], synthetically describing the features[9] of a working relationship[10], namely[11]:

- be performed as instructed and under the control of another person;
- involve the entrant's integration into the organization of an enterprise;
- be executed exclusively or principally for the account of another person;
- be personally performed by the worker;
- be conducted in accordance with a specific timetable and at a specific place or accepted by the person receiving the work;
- have a given (predetermined) duration and show some continuity;
- assume that the worker is at the disposal of the other person;
- to involve the beneficiary, equipment, materials, energy, as the case may be, to make available.

In its Recommendation no. 198/2006 the following aspects are also listed[12]:

- the regularity of the worker's remuneration;
- the fact that its remuneration constitutes the sole or main source of income;
- payment in kind is made in the form of resources (for living), dwelling, transport or other;
- recognition of rights for the person who provides work, weekly rest and annual leave;
- financing of the worker's occupational movements by the beneficiary of the work;
- absence of financial risks for the worker.

b). The second requirement laid down in the case concerns the succession of employment.

The only legal text defining what is meant by "*successive contracts*" is art. 82 par. 5 of the Labor Code, according to which: "Individual fixed-term employment contracts concluded within 3 months of the termination of a fixed-

[8] http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0:NO::P12100_ILO_CODE:R198, consulted on 1.10. 2018.

[9] It should be noted that for the first time these features were synthesized in a O.I.M.

[10] The concept of "*employment relationship*" refers to a segment of employment relationships – i.e. those based on a negotiated private contract (within the legal framework) by the parties. The employment relationship can be defined as the social relationship of legal subordination and economic dependence under which a natural person carries out work for the benefit of another natural or legal person, the latter having the obligation to remunerate and ensure the necessary conditions for carrying on the activity. All types of people who have entered into labor contracts or atypical contracts, similar to a labor contract (see, to that effect, R. Dinitriu, D*reptul muncii. Anxietăți ale prezentului*, Rentrop&Straton Publishing House, Bucharest, 2016, p. 25).

[11] http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0:NO:: P12100_ILO_CODE:R198, consulted on 1.10. 2018.

[12] *Idem.*

term employment contract are considered to be successive contracts and may not last for more than 12 months each".

Therefore, in the view of the Romanian legislator, if between two individual employment contracts the period between the termination of the first and the second contract is longer than 3 months, such contracts – in terms of labor law – are not considered successive (although they actually have this character)[13]; such a legal construction would make it impossible to comply with the existing requirement.

c). The third condition is that the successive hiring is done on the same job.

From the analysis of the legal norms, it is clear that every legal person has to draw up his own rules of organization and operation – as an instrument that reflects the existing positions within the unit[14]. It is illustrative from this point of view art. 40 par. 1 letter a) of the Labor Code, which regulates the employer's right to determine the "organization and functioning of the unit"[15].

As a clarification, it must be emphasized that the employer will be able to exercise its legal right to resort to the change in the organizational chart whenever it will establish that it is an operation whose purpose is to organize and operate the unit.

Although it makes frequent references to them, the legislation in force, including the Labor Code, does not contain a unitary, stand-alone regulation on the notion of regulation of organization and functioning[16]. Therefore, we appreciate that arbitrariness, the possibility of an abusive attitude that might lead to amendments to this internal act may arise precisely from the desire to circumvent the limitation imposed by art. 33 of the Labor Code.

d). The fourth requirement requires that each of the persons assigned to that post has been verified – in terms of professional skills – exclusively through probation.

The probation period may be inserted in any individual employment contract; in the absence of an express provision, the probationary period may be used by the employer as an alternative to the other forms of prior checking of the professional and personal skills of the person selected for employment (competition/exam, practical test, interview, recommendation) or, on the contrary, cumulatively[17], respectively, after completing one or more of these forms, carry out the checking of the employee, additionally also through the probation period.

We can conclude that if the employer were to employ another way of checking the employee's skills (for example, interviewing), the requirement outlined above could no longer be met; and, as a natural consequence, the legal limit of 12 months could be overcome.

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[13] To be seen I.T. Ștefănescu, *op. cit.*, p. 567.
[14] *Idem*, p. 63.
[15] *Ibidem.*
[16] *Ibidem.*
[17] It can not be cumulated with the stage.

e). The fifth condition limits the period of successive job placement for several people, on probation, to 12 months.

Taking all this into account, we believe that by law, after this period, employment will take place without a probationary period.

3. Conclusions

The following conclusions can be drawn from setting up the applicable legal regime in the area covered:

a). The Constitutional Court has stated in the Decision no. 334/2012 that "the legal regime applicable to legal employment relationships during the probation period was expressly regulated by the legislator as being special in relation to those for which no such period is established".

b). From the content of art. 33 of the Labor Code – as we have seen above – it is clear – the need to meet cumulative requirements – otherwise the 12-month legal limit for employment can be exceeded using the probationary period.

Practical reasons raise the following hypothesis: an employer observes in extenso the legal regime established by art. 33 of the Labor Code, but wishes to continue, after the expiry of the 12-month period, to employ people on that post, using the probationary period. That employer points out that it is not possible to speak of an abusive attitude – all existing employees having the initiative to terminate individual employment contracts by written notice – a distinct way of ending legal relationships during the probationary period (it is a remunerated job with the salary country gross guaranteed minimum).

Regarding the situation highlighted, however, we consider that, on the one hand, the text avoids a possible abuse of rights[18]. As a consequence, we believe that the legislator's intention to prevent abuse of rights must prevail; art. 33 of the Code is justified and must be maintained – without the possibility of its violation.

c). The 12-month period is more than enough to actually verify the skills and knowledge of employees employed under this condition.

d). And in the past, prior to Law no. 40/2011 for the amendment and completion of the Labor Code[19], the legal literature[20] has argued that art. 33 (stating that the successive employment of more than three persons (in the sense of employing one person per second, without interruption between the respective employment) on probationary periods for the same post was forbidden). Impedes the employer's ability to select employment and, consequently, made it clear that this legal text should be suppressed.

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[18] To be seen I.T. Ștefănescu, *op. cit.*, p. 324; A. Țiclea, *Tratat de dreptul muncii – Legislație. Doctrină. Jurisprudență,* X[th] ed. updated, Universul Juridic Publishing House, Bucharest, 2016, p. 450.

[19] Published in the "Official Gazette of Romania", part I, no. 225 of March 31, 2011.

[20] To be seen V. Zanfir, *Codul muncii comentat*, Tribuna Economică Publishing House, Bucharest, 2004, p. 31.

Independently of all these aspects, but in correlation with them, we emphasize that it would be useful for the legislator to express, in the drafting of art. 33 of the Labor Code, clearly and precisely. Indeed, it is necessary to state expressly the possibility of exceeding the 12-month limit in the mechanism of use of the probationary period in the context in which no abuse of rights is raised.

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