

WORK REPORT OF PROFESSIONAL ASSISTANTS IN ROMANIA

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Abstract: Romanian legislation regulates two categories of professional assistants: professional maternal assistants and professional personal assistant. Professional maternal assistants represent a distinct category of workers who perform their activity under individual fixed-term employment contracts having a special character. The maternal assistant who takes care of the child with severe or accentuated disability until the age of majority may choose to become a professional personal assistant. We consider that this category of employees also carries out their activity under individual contracts of fixed-term work having a special character.

Keywords: professional maternal assistant; professional personal assistant; individual employment contract a special character;

In the field of social assistance¹ social workers activate, other specialized personnel in social assistance, as well as personnel with different professions, qualifications and competences. Law no. 466/2004² regulates the Statute of the social worker³ in Romania, specifying the role of the National College of Social Workers, hereinafter referred to as the College, in the defense of the professional interests of its members.

The social worker can carry out his activity in salary or independently, with the right of free practice: a) in the public sector, in accordance with the provisions of Law no. 53/2003⁴ – Labour Code, as subsequently amended, and of the Administrative Code; b) in the private sector, in compliance with the provisions of Law no. 53/2003, with the subsequent amendments, the provisions of the regulations of the company or organization concerned.

The main purpose of the social worker activity is to assist the people or communities in need, getting involved in identifying, understanding, evaluating and solving social problems.

These assistants represent a category of personnel distinct from the maternal assistants, or the professional personal assistants of the disabled person.

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¹ Marioara Țichindelean, *Social assistance legislation*, Legal University publishing house, Bucharest, 2017, p.218

² Published in the Official Gazette of Romania, Part I no. 1088 of November 23, 2004

³ Dan Top, *Social security law*, Zven publishing house, Tirgoviste, 2017, pp. 463-468

⁴ Published in the Official Gazette of Romania, Part I, no. 72 of February 5, 2003

In France, according to the Code of social action and the family, there are two categories of professional assistants dealing with young people under 21: the maternal assistant and the family assistant⁵.

Romanian legislation regulates two categories of professional assistants: professional maternal assistants and professional personal assistant.

Professional maternal assistants represent a distinct category of workers who perform their activity under individual fixed-term employment contracts having a special character.

Their activity is regulated by Law no. 272/2004 on the protection and promotion of the rights of the child⁶ and Government Decision no. 679/2003 regarding the conditions for obtaining the certificate, the certification procedures and the status of the professional maternal assistant⁷.

The Court of Justice of the European Union (Grand Chamber) has reached its conclusion⁸ that the maternal assistants are in contractual relations with their employers, which implies subordination to the competent public authority. As a result, they must be considered workers within the meaning of Directive 2003/88 / EC⁹. The fact that their activity is approaching, to a large extent, the responsibilities assumed by parents towards their own children is not likely to lead to another conclusion.

The Court of Justice of the European Union has made important clarifications regarding professional maternal assistants¹⁰. Thus, it established that they have the status of workers within the meaning of Directive 2003/88 / EC. He advocates for this solution especially the fact that they carry out their activity under an individual employment contract, it is especially special, different from the standard contracts regulated by the Labour Code. However, maternal assistants, although they have the aforementioned quality, do not enjoy the rights established by the same directive for any worker regarding weekly rest periods, legal holidays or non-working days, and paid annual leave. However, maternal assistants may request the contracting authority the right to separate from the child in certain periods of time. Their situation is therefore a particular one, considering the best interests of the child, which is radically different from that of the other workers. This situation is justified considering the special, extremely important mission of professional maternal assistants: to ensure the raising, care and education of children; ensuring a harmonious physical, mental, intellectual and emotional development; their

⁵ Ana Ștefănescu, *Work at home and telemunca. Internal and comparative law*, Juridical Universe Publishing House, Bucharest, 2011, p. 155

⁶ Republished in the Official Gazette of Romania, Part I, no. 159 of March 5, 2014, subsequently amended.

⁷ Published in the Official Gazette of Romania, Part I, no. 443 of June 23, 2003, as subsequently amended.

⁸ Case C-147/17, delivered on November 20, 2018, published in the Romanian Labour Law Review no. 6/2018, pp. 155–171.

⁹ Published in JOCE, L.299 / 9 of November 18, 2003.

¹⁰ Alexandru Țiclea *Professional maternal assistants - a category of workers*, in Law no. 11/2019, p. 54

integration in the families of the assistants, as well as in the social life. From the perspective of the mentioned mission, professional maternal assistants exercise the duties of the natural parents and can be likened to them. no maternal assistants have the right, except for authorization, for such breaks.

The High Court of Cassation and Justice by Decision no. 25.2018¹¹ analyzed the appeal in the interest of the law with which it was invested not only on the basis of national regulations (Government Decision no. 679/2003, Law no. 272/2004, the Labour Code), but also of European norms (Directive 89/391 / EEC and Directive 2003/88 / EC). It also took into account the decision of the Court of Justice of 20 November 2018.

It was shown that, “The High Court rightly retained the specificity of the legal employment relationships of professional maternal assistants, thus: they do not perform the work for the benefit of the other party of the individual employment contract (the public service for the protection of the child); the object of the contract is to raise, care and educate the children received in the placement; the duration of the mentioned reports is one determined according to the validity of the certificate of maternal assistant; the place of work is the assistant's residence; the activities carried out by it do not fall within a fixed work program, but depend on the needs of the child; the assistant's work is a flexible one, which can also deal with his personal problems, but, of course, so that the interests of the child are not affected. The supreme court, in view of the object of the referral, has reached the fair conclusion that professional maternal assistants are entitled to paid annual leave, but they have the obligation, also during this period, to take care of raising, caring and educating children, when they have not requested the employer, during that period, separation from the placed or entrusted child. It is a natural solution since the maternal assistants become a substitute for the natural parents”¹².

The individual employment contract ends on the date¹³ issuing the disposition of the director for establishing the measure of placement under emergency or of the decision of the commission for the protection of the child / court regarding the establishment of the measure of placement.

The activity of professional maternal assistants is carried out on the basis of an individual employment contract of special character¹⁴. This is such a contract because:

- is regulated by specific legal provisions;
- is different from the standard contracts provided by the Labour Code;
- the employer, part of the contract, has a certain quality;
- the object of the contract is to raise, care and educate the children in placement or maintenance, as well as payment of a monthly allowance to the provider;

¹¹ Published in the Official Gazette of Romania, Part I, no. 135 of February 20, 2019.

¹² Alexandru Țiclea *Professional maternal assistants*, art. cit, p.55

¹³ Dan Top, *Social security law, 3rd edition*, Zven publishing house, Targoviste 2017, p. 343

¹⁴ Alexandru Țiclea *Professional maternal assistants*, art. cit., p. 56.

- the activity is carried out at the employer's domicile;
- the contract has as an annex the agreement concluded with the employer;
- the contract is concluded for the validity period of the professional maternity certificate.

The object of any individual employment contract consists of "the benefits to which the two parties were obliged, mainly the work provision by the employee and, correlatively, the payment of the salary by the employer"¹⁵.

Mainly, the maternal assistants form substitute families, taking over the parental obligations regarding the raising, care and education of the children.

Specificity of the benefit¹⁶ it is also due to the fact that the beneficiary is not the employer, but the child assigned to the maternal assistant.

For his work, the professional maternal assistant is entitled to a remuneration, entitled a monthly placement allowance¹⁷.

The place of work is an essential clause of any individual employment contract¹⁸, so in the case of these workers. Due to its specific nature, the activity of the maternal assistant professional can be performed only at his home (art. 122 para. 3 letter A of Law no. 272/2004).

It is understood that the notion of "domicile" presents, in this case, an extended acceptance, namely that this is not only the place where the person has the main dwelling (art. 87 C. civ.), But also where the secondary dwelling (art. 88 C. civ.), Where it is actually and where it operates in the situation discussed by a professional maternal assistant. It is only important for him to prove that he has a suitable home for his family and, of course, the child received in the placement. So, where that home is located, there is the "domicile" provided by law¹⁹.

The activity of the person certified as a maternal assistant, according to the law, is carried out on the basis of a special contract, related to the protection of the child, concluded with the management or an accredited private body, which has the following characteristic elements²⁰:

- a) the activity of raising, caring and educating the children in placement is carried out at home;
- b) the work program is imposed by the needs of the children;
- c) the planning of free time is done according to the family and children program in placement;

¹⁵ M. Gheorghe, *Individual labour law*, University course, Universul Juridic Publishing House, Bucharest, 2015, p. 76. In the same sense is S. Panaite, *Individual Labour Law*, Hamangiu Publishing House, Bucharest, 2017, p. 43.

¹⁶ Alexandru Țiclea *Professional maternal assistants*, art. cit, p.58

¹⁷ This allowance, "relative to the reference social indicator, is in the amount of 1,20 ISR" for each child [art. 128 paragraph 1 of Law no. 272/2004]. It is intended to ensure the rights of the children "to food, clothing, footwear, sanitary equipment, supplies / manuals, toys, transport, cultural-sporting materials, as well as money for personal needs" [art. 129 paragraph 1 of Law no. 272/2004].

¹⁸ I. T. Stefanescu, *Theoretical and practical treatise on labour law*, 4th edition, revised and added, Juridical Universe Publishing House, Bucharest, 2017, pp. 353-354.

¹⁹ Alexandru Țiclea *Professional maternal assistants*, art. cit, p.58

²⁰ Dan Top, *Social Security Law*, op./cit, p. 359

d) during the period of legal rest leave ensures the continuity of the activity performed, unless the separation, during this period, of the child placed in his family is authorized by the management

The work program of the professional maternal assistant is quite characteristic; he is both "unnatural" but also flexible, being derogatory from the common one of 8 hours a day and 40 hours a week (art. 112 para. 1 C. work). It is "unnatural, as it is not set at a number of hours per day and / and per week. It is flexible, because the hours between the activity are not specified, these being at the choice of the maternal assistant according to the needs of the child²¹. Indeed, art. 122 paragraph 3 lit. b of Law no. 272/2004 states that "the work program is imposed by the needs of the child".

The labour code gives the possibility²² to the employer, by the provisions of art. 118, to establish individualized work programs, which require a flexible way of organizing the working time, with the agreement of the employee concerned, if this possibility is stipulated in the internal regulations or in the applicable collective labour contracts.

The professional maternal assistant has free time, except that it does not comply with the standards established by the Labour Code on the daily rest, on the week and on the legal holidays in which they do not work. It is planned by the assistant "according to the program of the family and the children in placement" (art. 122 paragraph 3 letter c of Law no. 272/2004). Rather, the maternal assistant has only free time sporadically at any time of the week as the needs of the child are permanent, daily (and after 4 pm), at the end of the week, as well as on legal holidays. From this point of view his situation resembles that of the natural parents²³.

The professional maternal assistant has the right to legal rest leave. Its implementation is possible in two ways:

- first, the leave is made together with the child given in the placement;
- second, the leave is made separately from the child, based on the authorization of the competent authorities. In this case, therefore, the child is placed in placement with another maternal assistant or a child care institution.

Regarding the first way to make the leave of rest, in the conditions in which the child is in the care of the maternal assistant, the law requires him to ensure "the continuity of the activity carried out" (art. 122 paragraph 3 letter d of Law no. 272/2004), that is to deal with in this period of raising and educating the child received in placement. Of course, in this hypothesis one may ask the question whether this is a true, actual, actual leave? Answer: it is an atypical rest holiday, determined by the interest of the child who also needs to take care of him during

²¹ Alexandru Țiclea *Professional maternal assistants, art. cit, p.58*

²² Dan Top, *Treaty on Labour Law*, Mustang Publishing House, Bucharest, 2018, p. 441

²³ Alexandru Țiclea *Professional maternal assistants, art. cit, p.59*

the leave of his assistant. Therefore, it can be considered as a rest holiday improper, even, dare we call it, illusory.

As the High Court of Cassation and Justice ruled²⁴ during the mentioned leave the professional maternal assistant is not entitled to the leave allowance, on the grounds that during this period he is paid with the monthly placement allowance, and the granting of two categories of remuneration is inadmissible. However, the allowance will be received by the maternal assistant in the event that the leave is made separately from the child, this being the replacement value of the mentioned allowance.

According to art. 9 of the Government Decision no. 679/2003, "for each child received in placement or in custody, the professional maternal assistant concludes a convention, which constitutes an annex to the individual employment contract concluded with the employer". Noteworthy²⁵ is that this agreement is concluded with the written agreement of the husband or, as the case may be, of the wife of the professional maternal assistant.

According to art. 8 paragraph 2 of the Government Decision no. 679/2003, "the individual employment contract is concluded for the period of validity of the certificate". How this certificate is "issued for a period of 3 years" (art. 7 paragraph 1) means that the respective contract is concluded for this period of 3 years. It is therefore an individual contract of fixed-term work. The labor code allows the conclusion of such contracts (art. 82); Among the cases listed are those "expressly provided for by special laws", including the one regulated by Law no. 272/2004 and the Government Decision no. 679/2003.

In accordance with Art. 8 paragraph (4) of the Government Decision no. 679/2003, "The individual employment contract is suspended or terminated in the cases provided by the labor law, as well as in the case of suspension, withdrawal or termination of the certificate of professional maternal assistant." Therefore, there are different grounds and situations.²⁶ termination of the contract in question.

First, this contract is suspended and will terminate according to the provisions of the Labour Code. According to this normative act, the suspension can intervene by law, by the agreement of the parties or by the unilateral act of one of the parties (Articles 49-54), and its termination takes place by law, as a result of the agreement of the parties or as a result of the unilateral will of the to one of the parties (Articles 55–81).

The other method of termination is related to the existence of the certificate of professional maternal assistant. In this sense, according to art. 7 paragraph 4 of the Government Decision no. 679/2003, the attestation may be "suspended or withdrawn by the child protection commission, at the thoroughly motivated proposal of the specialized public service for the protection of the child or of the

²⁴ Decision no. 25/2018, *cit. over*

²⁵ Alexandru Țiclea *Professional maternal assistants*, art. cit., p. 60

²⁶ Alexandru Țiclea *Professional maternal assistants*, art. cit., p. 61

authorized private body that supervises the activity of the professional maternal assistant".

Thus, the suspension or withdrawal of the certificate will determine ex-law and the suspension or termination of the respective employment contract.

The maternal assistant who takes care of the child with severe or accentuated disability until the age of majority can opt²⁷ to become a professional personal assistant²⁸.

We consider that this category of employees also carries out their activity under individual contracts of fixed-term work having a special character.

According to art. 45 of Law no. 448/2006 regarding the protection and promotion of the rights of persons with disabilities²⁹, the adult with severe or accentuated handicap who does not have a living space, does not make incomes or makes incomes up to the level of the average salary on the economy can benefit from the care and protection of a professional personal assistant.

GEO no. 69/2018 for amending and supplementing Law no. 448/2006 regarding the protection and promotion of the rights of persons with disabilities³⁰ introduced paragraph. 1¹ so that the care and protection of the adult person with severe or severe disability is provided by the professional personal assistant, other than the husband, wife or relatives in a straight line.

The care and protection of adults with severe disabilities or accentuated by the professional personal assistant is based on the decision of the commissions for evaluating the adults with county disability, respectively local of the sectors of the municipality of Bucharest. The opinion of the adult with severe or severe disability will be taken into consideration when making the decision regarding the establishment of the professional personal assistant.

The individual employment contract of the professional personal assistant has been appreciated as "an individual contract of work at home, named, with special character, specific to the field of protection and promotion of the rights of persons with disabilities...."³¹

The employment contract of the professional personal assistant is concluded³² by the general directions of social assistance and the protection of the county child, respectively local of the sectors of the municipality of Bucharest, or by the providers of private social services, accredited in accordance with the law.

²⁷ The option can be expressed at least 30 days before the end of the special protection measure, established under the conditions of Law no. 272/2004 regarding the protection and promotion of the rights of the child, provided that within 6 months after the option has been expressed, the qualification courses or the stages of the process of evaluation and certification of professional competences as a professional personal assistant, completed with a qualification certificate or, as the case may be, with a certificate of professional competences

²⁸ Dan Top, *Social Security Law, op./cit*, p.403

²⁹ Republished in the Official Gazette of Romania, Part I, no. 1 of January 3, 2008

³⁰ Published in the Official Gazette of Romania, Part I, no. 625 of July 19, 2018

³¹ Ana Ștefănescu, *Work at home and telemunca. op cit.*, p. 160

³² Marioara Tichindelean, *Social assistance legislation*, Legal University publishing house, Bucharest, 2017, p.182

The conditions for obtaining the certificate, the attestation procedures and the status of the professional personal assistant are regulated by the Government Decision no. 548/2017 regarding the conditions for obtaining the certificate, the certification procedures and the status of the professional personal assistant³³.

The professional personal assistant is the natural person certified under the conditions of the decision, which ensures, through the activity that he carries out at his home, the care and protection of the adult with severe or accentuated disability based on his individual needs, according to the Law no. 448/2006 regarding the protection and promoting the rights of persons with disabilities.

Giving care and protection to the adult with severe or accentuated disability to the professional personal assistant represents a social service granted for the prevention of institutionalization, respectively for the purpose of deinstitutionalization.

The individual employment contract of the professional personal assistant is concluded with the DGASPC or the private providers of social services, accredited according to the law.

The individual employment contract begins to take effect on the date of the issuance of the provision establishing the protection measure of the adult with severe disability or accentuated to the professional personal assistant.

The individual employment contract shall be suspended or terminated in the cases provided by the Labour Code, in case of withdrawal or termination of the certificate of professional personal assistant, as well as if the professional personal assistant does not care for an adult person with a disability.

For each adult with severe or severe disabilities for whom the commission of evaluation of adults with disabilities has the protection measure to the professional personal assistant, the DGASPC or the private social service providers conclude a commitment with the professional personal assistant, as an additional act to the individual contract of work, by which it assumes the responsibility to fully realize the individual service plan of the adult with severe or accentuated disability.

The professional personal assistant has, according to art. 49 of the Law, the following main obligations³⁴:

- a) to participate annually in the training organized by the employer;
- b) to sign a commitment, as an additional act to the individual employment contract, by which it assumes the responsibility to fully realize the individual service plan of the adult with severe or accentuated disability;
- c) to provide for the adult with severe or accentuated disability all the activities and services provided in the individual employment contract, in the job description and in the individual service plan;

³³ Published in the Official Gazette of Romania, Part I, no. 659 of August 10, 2017

³⁴ Dan Top, *Social Security Law*, op./cit, p. 409

d) to treat the adult with severe or accentuated disability with respect, good faith and understanding and not to physically, mentally or morally abuse his / her condition;

e) to communicate to the general directions of social assistance and the protection of the county child, respectively local of the sectors of the municipality of Bucharest, within 48 hours from the acquaintance, any change occurring in the physical, mental or social state of the adult with severe or accentuated disability and other situations that may modify the granting of the rights provided by law.

Failure or inadequate fulfillment by the professional personal assistant of the obligations provided by the legal provisions for his task, as well as those provided in the individual employment contract, entails (art. 50) the disciplinary, civil, or, as the case may be, criminal responsibility of the professional personal assistant, according to the law.