Difficulties in enforcing the new probation period

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Abstract

During probation period, the employee is in a fragile position: he/she cannot be sure about the continuation of his/her labour relation. Law no 40/2011 modified the Labour Code in the sense of extending the probation periods in the case of contracts with non-fixed term and temporary contracts. Besides, according to the new provision, the period of time during which the employer may hire successively for probation periods several individuals for the same position is 12 months, the most. The paper aims to put into light the way in which the new regulations are to be applied, and several difficulties that this may bring in practice.

Keywords: *Labour law, probation period, internship*

The probation period is a way to check professional skills. It may be the most useful since the person requesting a job can prove his/her skills in the easiest way, by effectively executing his/her labour contract. Thus, the employer has the chance to see concretely how his future employee fulfils the tasks received. It is more than an employer can notice during an interview or an exam for the position. The worker already has the capacity of employee and his/her right to a salary, still being under supervision of the employer from the point of view of his/her professional skills.

The person during probation period has the same rights and obligations as any other employee. His / her labour contract shall not be limited to the probation period but shall be executed further on, if the employee is considered to be appropriate, or shall end, if the employer decides that the employee is not appropriate for the job.

Legally, the individuals placed on their probation period are not subject to other rights and obligations than the other employees.

One (and important) exception: at the end or during the probation period, the labour contract of the employee can end immediately, without prior notice or special procedure. Irrespective whether the labour contract ends because the employer initiates this or because the employee initiates it, the provisions regarding dismissal or resignation shall not apply.

This places the employee during probation period in a fragile position: the employee cannot be sure about the continuation of his/her labour relation. On the other hand, the employer cannot be sure of the employee either since the employee may keep on searching for another job and give up the contract executed during the probation period as soon as he/she identifies another preferable job. The relations

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between the two parties are not therefore clarified, although formally, the labour contract is still ongoing.

The regulations regarding the probation period are included in art. 31-33 in the Labour Code, as modified by Law no. 40/2011[2]. The aim of the modifications was „de-regulation" of the probation period, or regulations that allow using this probation period as a way to check the professional skills of the employee in as many instances as possible. Thus, the duration of the probation period was extended and the selection of the staff to be hired shall be done by several probation periods for the same job.

1. Duration of the probation period

The duration of the probation period shall be negotiated by the parties upon the conclusion of the individual labour contract. The law does not stipulate, however, certain maximal durations that cannot be exceeded. Although initially, the duration of the probation period was usually a maximum of 30 days, the duration of the probation period is currently a maximum of 90 days.

The probation period depends on the responsibilities of the job and on the duration of the labour contract itself.

Thus, we can have various durations, whether the labour contract is concluded for a non-fixed term or for a fixed term, or is a temporary labour contract:

Before 1 May 2011	Currently	Duration of the contract	Personnel
30 calendar days	90 calendar days	Non-fixed	Operational staff
90 calendar days	120 calendar days	Non-fixed	Management
45 – Law no 448/2006	45 – Labour Code, as changed by Law no. 40/2011	Non-fixed	Handicapped
5 calendar days	90 calendar days	Non-fixed	Unskilled workers
6 months	6 months internship	Non-fixed	Graduates
5 working days	5 working days	Fixed ≤ 3 months	Operational staff
15 working days	15 working days	3 – 6 months	Operational staff
30 working days	30 working days	> 6 months	Operational staff
45 working days	45 working days	> 6 months	Management
2 working days	2 working days	Temporary≤ 1 month	Operational staff
3 for 1-2 months	5 working days	1 – 3 months	Operational staff

[2] Published in the „Romanian Official Gazette", Part I, no 225 dated 31 March 2011. The Law no. 53/2003, modified, has been republished in the „Romanian Official Gazette", Part I, no 345 dated 18 May 2011.

Before 1 May 2011	Currently	Duration of the contract	Personnel
5 for > 2 months	15 working days	3 – 5 months	Operational staff
-	20 working days	> 6 months	Operational staff
-	30 working days	> 6 months	Management

Law no 40/2011 modified the Labour Code in the sense of extending the probation periods in the case of contracts with non-fixed term and temporary contracts. The lack of correlation previously existing in the Labour Code is still not solved – some terms are stipulated in working days, other terms in calendar days. In exchange, the probation periods have been correlated in the case of contracts with fixed term and temporary contracts.

The provisions regarding the probation period of a maximum of 5 days for unskilled workers have been abrogated; irrespective of their skills, workers shall be subject to a 90-day probation period.

In addition, the provisions of the collective labour contract applicable shall be taken into account; this contract may stipulate derogations from the legal restrictions but only in favour of the employee.

2. Special categories of employees

In case of certain categories of individuals, the probation period has some specific traits.

a) **Graduates of educational institutions** shall have internships, not probation periods.

Internship has been so far regulated only for certain jobs, especially freelancers. The modifications of the Labour Code in 2011 introduce internship as a general rule. Internships shall have a maximal duration of 6 months.

To note that the Romanian legislation does not include the *internship* concept. In other law systems, especially Anglo-Saxon, this category of workers has a different legal status than the other employees as they are mere candidates to positions of employees of that organization.

Thus, *internship* is a professional training similar to apprenticeship but used especially in *white-collar* fields of activity. The goal of this period is to acquire experience and to get a job in that very company. Generally, interns have the right to get at least the minimal salary in the sector but not the salary paid to the full-time employees who have the same responsibilities. There are interns that receive no pay, if their activity is limited to assistance provided to the activity performed by full-time employees (equivalent to production training sessions).

Legally, interns do not have a different status than other employees in Romania.

According to art. 31 paragraph 5 in the Labour Code, the first 6 months of the graduates of higher education institutions shall be considered as professional

start up and internship; except for those professions for which internships are regulated by special laws.

For instance, Law no 184/2001 regarding the organization of practice of the profession of architect[3], stipulates in art. 13 paragraph 1 that, in order to gain the signature right, the architect shall perform professional activity for at least 2 years in an architecture office or designing commercial company, under supervision of an architect who as a signature right. Similarly, Ordinance no 65/1994 regarding organization of the accounting examination activity and certified accountants[4], stipulates in art. 3 paragraph 1 that access to the profession of chartered accountant and certified accountant shall be based on an entrance exam for which at least a 7 – average mark and a 6 – minimal mark shall be obtained for each subject; a 3 year internship and skill assessment at the end of the internship.

According to the new regulations, at the end of the internship, the employer shall issue a certificate approved by the Labour Inspectorate.

b) The handicapped are entitled to a probation period of 45 working days.

To note a legal obstacle here. The duration of the probation period of the handicapped was, according to the previous Labour Code, 30 days. A special law, Law no 448/2006 regarding the protection and the promotion of the rights of the handicapped[5], stipulated derogations from the Labour Code, namely a probation period of 45 working days.

The changes in the Labour Code did not trigger modification of the initial term of 30 days although the article including the duration of the probation period was modified from other points of view. Under the circumstances, the question is – which regulations shall be applied:

- The new Labour Code, modified;
- Or Law no 448/2006?

The problem is in fact even more general. The situation is the following: the general law includes provision „A". Later, a special law derogates by provision „B" which shall be enforced with priority. After a while, the general law is modified without any reference to the special law and includes the entirely different provision „C" (or even provides the same rule as "A"). Which one shall be the applicable regulations in this case? On the one hand, the enforcement of the rule *specialia generalibus derogant* would lead to the conclusions that the special law is still in force since the new law is also general. On the other hand, the general law is a new law in relation to the special law which indicates the intention of the law-makers to enforce it. In addition, the legal norms are adopted to be enforced (*actus interpretandus est potius ut valeat quam ut pereat*), and we would neglect

[3] Republished in the „Romanian Official Gazette", Part I, no 771 dated 23 August 2004, modified by Law no 172/2010 published in the „Romanian Official Gazette", Part I, no 513 dated 23 July 2010.
[4] Republished in the „Romanian Official Gazette", Part I, no 13 dated 8 January 2008
[5] Republished in the „Romanian Official Gazette", Part I, no 1 dated 3 January 2008

this rule if we admitted that the new general law has been adopted without the purpose to enforce it.

Regarding the probation period of the handicapped, we consider that Law no 448/2006 is not in force anymore after the entering into force of the modified Labour Code, since apparently the intention of the law-maker has been changed. And the main reason for this solution is that in fact Law no 488 is not a special Law in relation with Labour Code, since both content rules specifically referring handicapped persons.

To note that art. 82 letter c) in Law no 448/2006 stipulates the right of the handicapped to counseling before being hired and during the recruitment as well as during the probation period, by an adviser specialized in labour mediation.

3. Use of the probation period

Prior to the changes in the Labour Code, art. 33 stipulated that successive hiring of more than 3 individuals for probation periods on the same position was forbidden.

In other words, if the employer used the probation period successively to check the professional skills of 3 workers, to fill in a position, the employer was forced to hire the 4th worker on that position without any probation period. This interdiction was creating practical difficulties for the employer from the point of view of the probation period.

Following the changes in the Labour Code, this provision was replaced by another restriction, slightly more enforceable in practice.

Thus, according to the new provision, the period of time during which the employer may hire successively for probation periods several individuals for the same position is 12 months, the most. The number of candidates tested to be hired on probation period is immaterial; what matters is the sum of the probation periods that shall not exceed 12 months. For instance, the employer could check the professional skills of 4 employees, successively, to fill in the same position, with probation periods of 90 days each.

Similarly, the employer may use the probation period to test 12 candidates if he uses probation periods of only 30 days.

The aspects related to the probation period are the contents of the communication stipulated in art. 17 in the Labour Code. The individual requesting a job shall be entitled to know the duration of the probation period and all the other aspects related to it.

Before the modifications, the Labour Code stipulated that if the employer failed to inform the employee about the probation period prior to the conclusion of the individual labour contract, the employer was no longer entitled to check the skills of the employee by using this probation period. This provision has been abrogated. It does not imply that the probation period is no longer communicated to the employee but there is no more special sanction stipulated.

According to art. 31 paragraph (4) in the Labour Code, during the probation period, the employee shall have all rights and obligations stipulated in the labour legislation, in the applicable collective labour contract, in internal

regulations and in the individual labour contract. The salary, the benefits shall be the same, as well as the responsibilities of the employee during the probation period.

Usually, an employee can only have one probation period – when an individual labour contract is concluded.

The regulations – kept after the modifications to the Labour Code – intend to remove the practice of successive probation periods, thus removing the provisions regarding a certain limited number of probation periods.

According to art. 32 paragraph 2 in the Labour Code, by exception, the employee can be placed on a new probation period with the same employer if the employee starts on a new position or a new profession with the same employer, or starts work in a job under difficult, damaging or dangerous work conditions.

If the employee is moved from one position to another and a new probation period is initiated, the new probation period shall be subject to a separate notification.

To note that, according to art. 17 paragraph (4) in the Labour Code, any change in the basic components of the contract during the execution of the contract shall imply an additional deed to the contract within 20 working days from the modification, except for cases where such a modification is expressly stipulated in the law.

Last but not least, the probation period is included when the years worked are counted and when all salary-related rights are calculated.

4. Termination of the labour contract

During or at the end of the probation period, any of the parties can terminate the contract by a notification, with no prior notice.

The termination therefore may not be justified or subject to any prior procedure.

If the employer initiates the termination of the contract, he needn't justify the termination or comply with any procedure covering dismissal. Courts actually had decided this prior to the modification enforced by Law no 40/2011. For instance, Bucharest Court of Appeal pronounced the following[6]: „The written form of the notification shall be the only condition to ensure its validity. Practically, art. 31 paragraph (3) in the Labour Code intended to simplify the formalities to terminate a labour contract with a precarious, unconsolidated nature. Under the circumstances, the decision needn't be justified de facto and de jure as the provisions in art. 62 paragraph (2) in the Labour Code and 61, as against art. 64 paragraph (1) in the Labour Code, that may cause nullity of the decision and the justification of professional inappropriateness and recommendation of another job, suitable for the professional skills of the person, are not applicable". From this point of view, Timişoara Court of Appeal[7] pronounced that, during the probation

[6] Bucharest Court of Appeal, Decision no. 1421 dated 17 May 2007, www.jurisprudenta.org
[7] Timişoara Court of Appeal, Decision no. 1034 dated 9 May 2008, www.jurisprudenta.org

period „the employer is entitled to terminate the individual labour contract without prior notice or justification, if the notification is written".

The termination can occur at the end of the probation period and during the probation period. In other words, if the employer finds that the employee does not meet the expectations, he is entitled not to wait for the 90 days to finish in order to notify the termination of the contract.

The written notification needn't be accepted by the other party. It shall be a mere communication regarding the intention to terminate the contract. However, nothing stops the employer to stipulate a short prior notice term in the notification.

If the employee initiates the termination of the contract, the employer shall register the notification received.

If the employer initiates the termination of the labour contract, he may not suggest the employee to fill in a vacancy, even if that job fits the professional skills of the employee. The provisions of art. 64 are not applicable.

In case of collective dismissal, if the employer re-creates those jobs he had dissolved within 45 calendar days since the date of the dismissal, the employee dismissed through collective dismissal shall be entitled to be hired again with priority on the position re-created for the same activity, with no exam, competition or probation period. It is therefore a case where the probation period is forbidden.

In this case, the employer shall inform the employees dismissed from the positions whose activities are resumed under the same circumstance of professional competence, in writing, that the activities are resumed.

The employees shall have 5 calendar days, at most, since the date when the employer informed them, to agree in writing to return to the jobs offered.

If the employees entitled to be hired again on the positions re-created do not express in writing their agreement or refuse the job offered, the employer shall be entitled to hire new people on those vacancies. These new persons could be hired by using the probation period.

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