

SPECIFICITY OF THE MATERNAL ASSISTANT'S EMPLOYMENT RELATIONSHIP

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Abstract

This paper analyzes the special character of the maternal assistant labor contract regarding the actual legislation and the jurisprudence in this matter. By trying to find a balance between the regulations of the Labor Code regarding the individual employment contract and the special regulations regarding labor contract of the maternal assistant, we notice that the institution of the maternal assistant is governed, first of all, by the principle of the best interest of the child. So, because we have to consider this an axiom, the maternal assistant is, in fact, a genuine replacement of a parent for the child who is in placement or in custody. That's why the content of this labor contract is all about the growth, care and the education of the child, without a strict connotation to the specific elements of the common labor contract, as the work program, the time to work and time to rest and even the subordination relationship with the employer. In this context, the common stipulations of la labor Code regarding the individual labor contract are only the general frame in which the work of the maternal assistant is taking place, because the content of his work is much more, legally and morally, that the norm.

Keywords: *individual labour contract, maternal assistant, child custody, best interest of the child, annual leave.*

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1. Preliminary considerations

The institution of the professional maternal assistant is governed by Government Decision no. 679/2003 regarding the conditions for obtaining the attestation, the attestation procedures and the status of the professional maternal assistant and aims to achieve the special protection of the child separately, temporarily or definitively, by his/her parents. Thus, according to art. 107 in conjunction with art. 109 of Law no. 272/2004 on the protection and promotion of the rights of the child, family-type services are those services which ensure the raising and care of the child separately or temporarily or permanently by its parents at the residence of a natural person or families, as a result of the establishment this law of the placement measure.

Placement and emergency placement are measures of special protection for a minor² whose parents are deceased, unknown, fallen from parental rights, or who have been subjected to the ban on parental rights, placed under a ban, declared court or missing, when it could not establish guardianship³. Both are governed by Law no. 272/2004 on the protection and promotion of the rights of the child.

Emergency placement of the child is determined by the situation of the child abused or neglected, as well as the situation of the child found or abandoned in the sanitary units.⁴

In particular, according to art. 1 of Government Decision no. 679/2003, the professional maternal assistant is a certified natural person, who carries out his/her activity at his/her home where he/she ensures the growth, care and education necessary for the harmonious development of the children he/she receives in the placement. Further, Art. 8 of the same normative act establishes that the maternal assistant carries out his/her activity on the basis of an individual labor contract of a special nature, specific to child protection. In this case, the employer is the specialized public

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² For other forms of protection of the minor in difficulty, see Laura Cetean-Voiculescu, Ada Hurbean, *Consideration regarding the amendaments to legislation on child protection through the New Civil Code*, Challenges of the Knowledge Society. Legal Sciences, Pro Univesitaria Publishing House, 2012, p. 299-304.

³ Laura Cetean Voiculescu, *Dreptul familiei, note de curs și manual de seminar*, Hamangiu Publishing House, Bucharest, 2012, p. 288-289.

⁴ *Idem*, p. 290.

service for child protection or an authorized private body that has the obligation to supervise and support the work of professional foster careers.

2. Specificity of the maternal assistant's employment relationship in Romania

In the context of the above-mentioned special regulation, referring to the provisions of the common law of the Labor Code, the legal framework for the work of the maternal assistant is the individual labor contract, the part of which is the maternal assistant as an employee and the specialized public service or the private body, as an employer. However, the special character of the employment relationship is reflected in the outline of the special conditions of the law. In this context, the necessary attestation of a person wishing to become a foster parent is a prerequisite for the conclusion of this contract.

Thus, art. 2 of Government Decision no. 679/2003 lays down the conditions that a person must fulfill in order to be able to apply for the attestation. These are:

- have full exercise capacity;
- through its behavior in society, its health status and psychological profile, to provide guarantees for the correct fulfillment of the parent's obligations regarding the raising, care and education of its children;
- to use a home which covers the needs of food, hygiene, education and rest of its users, including those of children to be placed in place or in custody;
- have previously received training courses organized by the specialized public service for child protection or the authorized private body conducting the assessment for the award of the professional maternity certificate.

Per a contrario, they can not be foster careers:

- a) the person who has been convicted by a final judgment which has become final for the commission of an offense;
- b) the parent who has been deprived of parental rights or whose child has been declared to be abandoned by a final judgment;
- c) the person suffering from chronic transmission diseases.

Another prerequisite and necessary condition for obtaining a professional maternity certificate is not to carry out any other paid work. Even if this requirement is a violation of the provisions of Art. 35 of the Labor Code⁵, regarding the accumulation of functions, the content of the future contract that the maternal assistant will conclude, as well as the field in which he works, which enshrines and defends the child's superior interest as a fundamental value, renders him incompatible with other activities.

If these prerequisites are met, the person wishing to become a foster mother must submit an application for assessment of his/her capacity to the county public service specialized in the protection of the child on whose territory he/she is domiciled or to an authorized private body. This evaluation, carried out over a certain period of time, is the basis for the issue of the professional maternity certificate and focuses, according to art. 4, paragraph 2, of the Government Decision no. 679/2003 on three components: the social, psychological and medical component of the applicant⁶. We believe that these three elements, but more specifically the latter two, must also be considered with regard to the other members of the applicant's family, since the care, growth and education of

⁵ Art. 35 paragraph 1 stipulates: *Every employee has the right to work with different employers or with the same employer, on the basis of individual labor contracts, with the corresponding salary for each of them.*

⁶ According to art. 4 paragraph. 2 of the Government Decision no. 679/2003, the evaluation, on the three components, shall be carried out by: a) interviews with the applicant and the persons with whom he lives by a social worker and by a psychologist who determines the psychological profile of the applicant, to become a professional nursing assistant and the position of the persons with whom he lives in relation to the implications of this activity; b) visits to the applicant's home, in order to verify the fulfillment of the condition regarding the living space; c) recommendations of the neighbors, acquaintances, relatives of the applicant, as well as representatives of the local public authority at his/her domicile regarding the social behavior of the applicant; d) any additional investigations that are considered useful by the Valuer. During the assessment period of the applicant, the specialized public service for child protection or the authorized private body is obliged to organize vocational training courses as a professional nursing assistant.

the child to be entrusted will take place within the family of the future foster parent. Moreover, this legal possibility is reviewed even by the normative act mentioned above - according to art. 6 paragraph 5, the child protection commission, notified by the applicant with a request for the issue of a professional maternity certificate, may request the hearing of other persons, as well as any additional information they consider necessary.

The period of validity of the attestation is for a maximum of 3 years and may be renewed by the Child Protection Commission upon a duly motivated proposal of the public service or the authorized private body supervising the activity of the foster parent.

Prior to the conclusion of the special employment contract, in fact, prior to obtaining the certificate of professional maternity assistant, it is informed about the conditions in which it has to carry out this activity, the rights and obligations that will be recovered, according to the provisions of Order no. 35/2003 regarding the approval of the Minimum Mandatory Standards for ensuring child protection in the professional maternal assistant and the methodological guide for the implementation of these standards, issued by the National Authority for Child Protection and Adoption. This information is a true transposition in this particular field, the provisions of art. 17 of the Labor Code governing the obligation to inform the future employee about the clauses that the future employer intends to insert in the individual labor contract. As well as the common law in the field, the elements that appear in the information of the maternal assistant will be found in the content of his future employment contract.

In particular, the individual labor contract of the maternal assistant has at its core the activity of raising, caring and educating the children in foster care by integrating them into his/her family. Therefore, the workplace, by way of derogation from the common law, is at the domicile of the foster mother, and the duration of this contract is determined by 3 years, ie the period of validity of the attestation (with the possibility of extending the duration, subject to the renewal of the attestation).

Another aspect of the special character of this contract lies in the social value that appears and promotes it - the superior interest of the child. We believe that this value is overridden by both the onerousness of the individual labor contract of the maternal assistant and the relationship of subordination that must exist between the employee and the employer. In particular, if in the individual labor contract each of the parties aims to obtain a material interest (the employer's work and the salaried employee), in this situation we consider that the priority interest of both sides must be the growth, education, care and harmonious development of the child in foster care.

As regards the relationship of subordination that arises with the conclusion of the individual labor contract, it is noted that the maternal assistant will not perform the work for the employer, within the meaning of art. 10 of the Labor Code, the employer being a specialized public service for child protection/the child protection department or an accredited private body. Therefore, it does not seek to bring a benefit through the work done, but only the protection of the child is pursued. In other words, subordination takes place, first of all, vis-à-vis a child's best interest-principle, and then towards the employer.

However, even if it is not at the forefront, the relationship of subordination subsists because, according to the law, the employer, on the one hand, has the right and the obligation to observe the obligations of the maternal assistant, and on the other hand he must provide support to the employee (maternal assistant) to fulfill the obligations assumed regarding the foster child/children.

Thus, according to article 10 of Government Decision no. 679/2003, the obligations of the maternal assistant are:

- a) ensure the growth, care and education of children, in order to ensure their harmonious physical, mental, intellectual and emotional development;
- b) ensure the integration of children into his/her family by applying equal treatment to other family members;
- c) ensure the integration of children into social life;
- d) to contribute to the preparation of reintegration of children into their natural family or to their integration into the adoptive family, as appropriate;

e) to allow the specialists of the specialized public service for the protection of the child or the authorized private body to supervise his/her professional activity and to evaluate the evolution of the children;

f) to ensure the continuity of the activity carried out and during the period of legal leave, unless the separation from the children placed for this period is authorized by the employer;

g) keep the confidentiality of the information it receives about children.

h) to immediately inform the specialized public service for the protection of the child or the authorized private body supervising their work on any change in their personal, family or social situation which could affect their professional activity.

i) participate in training courses organized by employers.

Also, the professional nursing assistant and the persons with whom he/she lives have the obligation to present annually to the child protection commission a medical certificate indicating that their state of health permits the continuation of the activity. This is a true periodical medical examination and extended to the members of the foster care family as the foster child is cared for, educated and raised in the family.

The individual labor contract of the maternal assistant must be seen as a contract that implies a high degree of adaptability to the specific needs of each child in placement within the general limits provided by the legislator but can not be molded into the classical structure of the individual labor contract regulated by the Labor Code. As a result, the maternal assistant's work schedule will not be limited to 8 hours a day, 5 days a week, as is the case with the classical employee. It can not be imagined how a harmonious physical, mental, intellectual and, last but not least, emotional development of a child can be assured during the normal working hours provided by the Labor Code, just as a situation can not be imagined where the employee (maternity assistant) would require compensation for overtime over the normal working time. The work of a person who temporarily replaces that of a parent does not start at 8 o'clock and does not end at 16 o'clock, does not take place intermittently during the weekend or on public holidays.

In this respect, we bring the Cause C/147/17 Family Association Constanta U.C., S.J., D.B., C.A., G.C., S.C. against the General Directorate for Social Assistance and Child Protection Constanța, [request for preliminary ruling by the Court of Appeal Constanța (Romania), Preliminary ruling - Directive 2003/88/EC - Working time - Scope - Concept of worker - Parental assistants - Derogation', the plaintiffs in the main proceedings, General for Social Assistance and Child Protection Constanta, as a foster parent. They take care of foster children and work in their own home 24 hours a day, including weekly rest and holiday days. Parents are required to continuously supervise and care for foster children, except for periods of schooling. Specifically, foster care workers must ensure the continuity of childcare, even during the period of legal leave, unless the separation of children for that period is authorized by the competent authority.

In this context, maternal assistants demand, on the one hand, additional payments representing 100% of the basic salary for the work done on weekly rest, on public holidays and on the other days when, according to the regulations in force, does not work. On the other hand, they claim pecuniary compensation for unpaid leave. During the annual rest leave, children are still in their care, because separation from children is, as has been shown, subject to the authorization of the competent authority.

At first instance, the Constanța Tribunal dismissed the application as unfounded.

The decision was appealed against at the Constanța Court of Appeal. Having doubts as to the correct interpretation of the relevant provisions of European Union law, that court decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

„1. If the provisions of Article 1 (3) of [Directive 2003/88] in relation to Article 2 of [Directive 89/391] must be interpreted as excluding from its scope an activity such as that of foster care applicants?

2. If the answer to Question 1 is in the negative, is Article 17 of [Directive 2003/88] to be interpreted as meaning that an activity such as that of the foster parents carried out by the

applicants may be exempted from the provisions of Article 5 of the Directive pursuant to [Article 17] paragraph 1, paragraph 3 (b) and (c) or paragraph 4 (b)?

3. If the answer to the previous question is in the affirmative, is Article 17 (1) or, where applicable, Article 17 (3) or (4) of [Directive 2003/88] to be interpreted as meaning that such a derogation must be express or may also have implicit character by adopting a normative act of a special nature which provides for other rules for the organization of working time for a certain professional activity; where such a derogation may be non-express, what are the minimum conditions for national legislation to be regarded as derogating, ie whether such a derogation can be expressed in the manner resulting from the provisions of Law No. 272/2004?

4. If Question 1, 2 or 3 is answered in the negative, is Article 2 (1) of [Directive 2003/88] to be interpreted as meaning that the period during which a nursing mother is in the care of the child being cared for at her own home or in another place chosen by him, is working time even if he does not carry out any of the activities prescribed in his/her task in the individual employment contract?

5. If Question 1, 2 or 3 is answered in the negative, is Article 5 of [Directive 2003/88] to be interpreted as precluding national legislation such as that contained in Article 122 of Law No. 272/2004; and in the case of a reply within the meaning of Article 17 (3) (b) and (c) or (4) (b) of the Directive, whether it is to be interpreted as precluding the same national rules?

6. If Question 1 is answered in the negative and if Question 4 is answered in the affirmative, can Article 7(2) of Directive [2003/88] be interpreted as not precluding the grant of equal compensation the employee would have been entitled to annual leave during the period in which the nature of the activity carried out by the foster parents renders her unable to carry out that leave or, although the formal leave is granted, the employee continues to practice the same work in the same situation is not separation from the child being cared for during that period? In the affirmative, in order to be entitled to compensation, does the employee require the separation from the child and the employer did not grant him the permission?"

The essence of the case in question is the question whether the activity of foster careers falls within the scope of Directive 2003/88/EC laying down rules on working time⁷. Succinct, in

⁷ Article 1 governs the scope and scope of the Directive. It provides that:

"1. This Directive lays down minimum safety and health requirements for the organization of working time.

2. This Directive shall apply to:

(a) minimum daily rest periods, weekly rest and annual leave, as well as breaks and maximum weekly working time;

(b) certain aspects of night work, shift work and work patterns.

3. This Directive shall apply to all sectors of activity, private or public, within the meaning of Article 2 of Directive [89/391], without prejudice to Articles 14, 17, 18 and 19 of this Directive.

Without prejudice to Article 2 (8), this Directive shall not apply to seafarers as defined in Directive 1999/63/EC.

4. The provisions of Directive [89/391] shall apply in full to the matters referred to in paragraph 2, without prejudice to the more stringent or special provisions of this Directive."

Article 3 of Directive 2003/88 regulates daily rest. It provides:

"Member States shall take the measures necessary to ensure that a worker has a minimum rest period of 11 consecutive hours during a 24-hour period."

Article 4 of the Directive sets the break time. It provides as follows:

"Member States shall take the necessary measures to ensure that every worker benefits, where the daily working time exceeds six hours, from a rest period, the modalities of which, in particular the duration and conditions under which they are granted, shall be laid down in collective agreements or agreements concluded between the social partners or, in their absence, by national law. "

Article 5 of the Directive refers to weekly rest. It provides as follows:

"Member States shall take the necessary measures to ensure that every worker receives, within a period of seven days, a minimum uninterrupted rest period of 24 hours plus the 11 hours of daily rest referred to in Article 3.

In justified cases due to objective, technical or organizational conditions, a minimum rest period of 24 hours may be established."

Article 6 of Directive 2003/88 lays down the rules applicable to maximum weekly working time. It provides:

"Member States shall take the necessary measures to ensure that, in accordance with the requirements for the protection of the health and safety of workers:

(a) weekly working time is limited by laws, regulations or collective agreements or agreements between the social partners;

(b) the average working time for each seven-day period, including overtime, shall not exceed 48 hours."

Article 7 of Directive 2003/88 provides:

"1. Member States shall take the necessary measures to ensure that every worker receives an annual paid leave of at least four weeks in accordance with the conditions for obtaining and granting leave provided for by national legislation and practice.

2. The minimum period of paid annual leave may not be replaced by a financial allowance, except where the employment relationship is terminated."

Article 17 of the Directive allows Member States to derogate from certain provisions of the Directive. It provides:

Directive 2003/88, seeks in the first place to ensure better protection of the health and safety of workers. As a minimum harmonization measure, it establishes a minimum standard of protection that Member States have to provide for workers, with regard, inter alia, to the duration of the day and week of work and annual leave. It also contains specific rules on the organization of shift work and night work (Articles 8 to 13 of the Directive).

Despite the fact that the emphasis was mainly on the protection of workers, it follows from the Directive that the legislator did not completely ignore either the need for flexibility in certain sectors of activity or the gradual emergence of new forms of work.

The final conclusion, presented by Advocate General Nils Wahl on 28 June 2018, was that foster parents do not fall within the scope of Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003, the national regulatory acts their activity is of a derogatory nature, which, moreover, is recognized by that directive. The justification for this exclusion can be found in the fact that the working time and the free time of the foster parents are imposed by the needs of the children in placement. Nursing assistants are required to provide continuous care for children without the right to rest periods, legal holidays or holidays specifically defined without the children concerned. In other words, for reasons related to children's needs, for foster careers, working time and leisure time are invariably interchangeable.

In essence, both the national and the European courts have highlighted the same aspect - the special and derogatory nature of the joint labor contract of the maternal assistant, in relation to the specifics of his work. Moreover, by Decision no. 25/2018 the High Court of Cassation and Justice⁸ explicitly enshrines the fact that the structure of the maternal assistant's work program can not be individually distinct and can not be overtime, holiday days or night bonuses. Also, as the child's needs imply a certain degree of unpredictability, neither the working schedule nor the maternity assistant's rest periods can be determined, nor the annual rest, ie the period of rest leave. This does not mean that the right to maternity leave is suppressed but adapted to the requirement to ensure continuity of activity in relation to the best interests of the child, especially when the law recognizes the possibility of the nursing assistant to request separation from the child/children in placement and making holidays in nature. Moreover, according to art. 146 paragraph (3) of the Labor Code, compensation in cash of unpaid leave is allowed only in the case of termination of the individual work construct.

3. Conclusions

In conclusion, even if the activity of the nursing assistant is based on an individual labor contract, its role in raising, educating, caring, harmoniously developing the child from all points of view must be assimilated to that of a parent. Without denying the importance of material peculiarity in the field, we believe that assuming this responsibility by a natural person should be seen more as a vocation and less as a job for remuneration. That is why understanding of this vision by the person requesting to become a foster mother must be fundamental and underpin the granting of the

"1. Taking account of the general principles of the protection of the safety and health of workers, Member States may derogate from Articles 3 to 6, 8 and 16 where, on the basis of the specific characteristics of the activity carried out, the length of time worked is not measured; predetermined or may be determined by the workers themselves, in particular in the case of:

(b) workers in family or family associations;

2. The derogations provided for in paragraphs 3 to 5 may be adopted by laws, regulations or administrative provisions or by collective agreements or agreements concluded between the social partners provided that the workers concerned are afforded equivalent periods of rest or where, in exceptional cases where it is not possible for objective reasons, to provide for such compensatory rest periods, workers shall enjoy adequate protection.

3. In accordance with paragraph 2 of this Article, Articles 3 to 5, 8 and 16 may be waived:

(b) in the case of security and surveillance activities requiring permanent presence in order to protect property and persons, in particular guards, guards or security and security firms;

(c) in the case of activities involving the need for continuity of services or production [...]

4. In accordance with paragraph 2 of this Article, Articles 3 and 5 may be waived:

(b) in the case of activities involving part-time working days, in particular those of cleaning staff".

⁸ Decision no. 25/2018 regarding the examination of the appeal filed by the Constanta Court of Appeal - Civil Division I, in Folder 6725/118/2015 regarding the issuing of the preliminary ruling, published in the Official Gazette no. 468/2018.

necessary attestation, together with the fulfillment of the other conditions expressly provided by the law. *Per a contrario*, if it is proven that, from the point of view of the nursing assistant, the material interest is a priority and not the superior interest of the child in the placement, we believe that it could constitute the basis of the withdrawal of the professional maternity certificate according to Article 11 (4) of the Government Decision no. 679/2003 by the Child Protection Commission and consequently the termination of his employment contract. Such a measure must also take into account the concrete development of the child/children within the family of the foster mother and, in the end, the superior interest of the child.

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