BRIEF CONSIDERATIONS REGARDING THE EXECUTION OF THE INDIVIDUAL EMPLOYMENT CONTRACT IN THE CONTEXT OF THE ALERT CAUSED BY THE COVID-19 PANDEMIC

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Abstract

Temporary/restrictive measures highlighted by the legislative context – necessary to prevent and eliminate imminent threats to fundamental rights and freedoms – also target the execution of individual employment contracts; the following categories of employers are covered by the present measures: those in the private system, central and local public authorities and institutions, regardless of the method of financing and subordination, as well as autonomous utilities, national companies, national companies and companies in which the share capital is wholly owned or majority state or an administrative-territorial unit.

Keywords: *labor contract; teleworking; home work; economic crisis; alert status; individualized program.*

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1. Introductory issues

In the context of the establishment of the state of emergency[2] followed, in the sequence of events, by the declaration of the state of alert[3], the legal regime regarding labor relations – regulated by labor law whose common law is civil law[4] – has undergone important changes.

Thus, against the background of the factual situation caused by the pandemic, the legislator resorted to establishing appropriate measures for crisis management, taking into account the need to ensure the premises for the phased return to normalcy.

2. Execution of the individual employment contract in the state of alert by telework/ work at home

Public institutions and authorities, as well as public and private economic operators[5] have the obligation to organize the activity, so that the work is carried out – as much as possible – from the employees' home through telework/work from home.

With regard to telework, we point out that we have in mind – when we talk about the legal regime – common law rules – applicable before the declaration of a state of emergency and emergency – incidents during the establishment of the state of emergency/alert.

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[2] Decree no. 195/2020 on the establishment of the state of emergency on the Romanian territory published in the "*Official Gazette of Romania*" part I, no. 212 of March 16, 2020; Decree no. 240/2020 on the extension of the state of emergency on the Romanian territory published in the "*Official Gazette of Romania*" part I, no. 311 of April 14, 2020.

[3] Decision no. 24/2020 on the approval of the establishment of the state of alert at national level and of the measures for prevention and control of infections, in the context of the epidemiological situation generated by the SARS-CoV-2 virus, published in the "*Official Gazette of Romania*" part I, no. 395 of 15 May 2020.

[4] See Al. Athanasiu, L. Dima, *Dreptul muncii*, Publishing House All Beck, Bucharest, 2005; R. Dimitriu, *Contractul individual de muncă – prezent şi perspective* –, Publishing House Tribuna Economică, Bucharest, 2005; C. Lefter, O.I.Dumitru, „Theory *and practice concerning the nullity of commercial companies*", in the volume "*Accounting and Management Information Systems – 4th International Conference AMIS 2009*", the Faculty of Accounting and Management Information Systems, Academy of Economic Studies, Bucharest, Romania, Publishing House ASE, Bucharest, 2009; I.T. Ştefănescu, *Tratat de dreptul muncii*, 4th ed., revised and added, Publishing House Universul Juridic, Bucharest, 2017; O.I. Dumitru, A. Stoican, *Business Law – Lecture Notes,* Publishing House ASE, Bucharest, 2019; Ion Traian Ştefănescu (coord.), *Codul muncii şi Legea dialogului social. Comentarii şi explicaţii,* Publishing House Universul Juridic, Bucharest, 2017; Ion Traian Ştefănescu (coord.), Monica Gheorghe, Irina Sorică, Aurelian Gabriel. Uluitu, Brânduşa Vartolomei, Ana Vidat, Veronica Voinescu, *Dicţionar de drept al muncii*, Publishing House Universul Juridic, Bucharest, 2014; R. Dimitriu, D*reptul muncii. Anxietăţi ale prezentului,* Publishing House Rentrop&Straton, Bucharest, 2016; B. Vartolomei, "*Dreptul muncii. Curs Universitar*", Publishing House Universul Juridic, Bucharest, 2016.

[5] See C. Lefter, O. I. Dumitru, "*Dissolution of the Commercial Companies due to the Passing of Time Established as a Duration of the Company – Theoretical and Practical Aspects"*, „Revista de Economie Teoretică şi Aplicată", no. 11/2011, p. 49-55.

A. The common regime applicable to telework is highlighted by Law no. 81/2018 on the regulation of telework activity[6]; according to art. 2 lit. a from the enacted normative act, telework means the form of work organization through which the employee, regularly and voluntarily, fulfills his attributions specific to the position, occupation or profession he holds, in another place than the work organized by the employer, at least one day a month, using information and communication technology.

The technique from a contractual point of view requires the following procedure: the realization of the agreement of will of the parties; the provision of these aspects expressly in the individual employment contract (once concluded, for newly hired staff, or by additional act to the existing individual employment contract).

B. Following the flexibility of the mechanism for executing the individual employment contract, during the state of emergency, art. 33 of Annex no. 1 to the Decree no. 195/2020 provided that telework/work at home to be implemented by the employer – where possible – unilaterally (by derogation from the common regime imposed, as we have shown, by Law no. 81/2018).

Consequently, at the level of the units, it was necessary to implement an internal/individual act that would materialize the application of art. 33 of the Decree no. 195/2020.

We appreciate that the measure ordered during the state of emergency represented a concretization of art. 48 of the Labor Code[7] – thus respecting the legal regime of the unilateral modification of the individual employment contract – moreover, of strict interpretation.

C. During the validity of the alert status, they become applicable the provisions of Law no. 55/2020 on some measures to prevent and combat the effects of the COVID-19 pandemic[8].

Art. 17 of Law no. 55/2020 establishes the essential requirement that the activity in telework/work at home regime be carried out with the consent of the employee[9]; the natural consequence of those underlined is the elaboration – from a procedural point of view – of an additional act to the existing individual employment contract.

We notice that, in the context of the alert state, the common regime established by Law no. 81/2018 on the regulation of telework activity.

3. Modification of the job or its duties in the alert state

The amendment of the two contractual elements requires – according to art. 17 of Law no. 55/2020 – concluding an additional act – obtaining the employee's consent.

Through the solution provided by art. 17 of Law no. 55/2020, we consider that it derogates from the common law regime prescribed by art. 48 of the Labor Code in accordance with which the employer may temporarily change the place and type of work, without the consent of the employee, and in case of force majeure, as a disciplinary sanction or as a measure to protect the employee.

4. The possibility of unilateral wage cuts in the context of the crisis caused by the pandemic

A. As a rule, the contractual element, the salary, can be modified only by the agreement of the will of the contracting parties – in compliance with the imperative provisions of art. 38 of the Labor Code (according to which, employees may not waive the rights recognized by law; any transaction that seeks to waive the rights recognized by law to employees or limit these rights is

[6] Published in the "*Official Gazette of Romania"* part I, no. 296 of April 2, 2018.

[7] In accordance with the provisions of this article, the employer may temporarily change the place and type of work, without the consent of the employee, and in case of force majeure, as a disciplinary sanction or as a measure to protect the employee, in the cases and under the conditions provided by the code.

[8] Published in the "*Official Gazette of Romania*" part I, no. 396 of 15 May 2020.

[9] Thus, the employer has the obligation to, as far as possible, allow employees telework or work at home – respecting the mandatory provisions of art. 6 para. 1 of Law no. 319/2006 on safety and health at work (published in the "*Official Gazette of Romania*" part I, no. 646 of July 26, 2006); consequently, the employer is obliged to ensure the safety and health at work of workers in all aspects related to work.

struck null and void).

B. We could identify, however, in the economic context affected by the crisis[10], the following hypotheses of unilateral reduction, legally possible:

- the corresponding reduction of the salary as an effect of the temporary reduction of the activity, for economic, technological, structural or similar reasons (art. 52 paragraph 3 of the Labor Code);
- demotion from the position, with the granting of the salary corresponding to the position in which the demotion was ordered, for a duration that cannot exceed 60 days (art. 248 paragraph 1 letter b of the Labor Code);
- reduction of the basic salary for a period of 1-3 months by 5-10% (art. 248 paragraph 1 letter c of the Labor Code);
- reduction of the basic salary and/or, as the case may be, and of the management allowance for a period of 1-3 months by 5-10% (art. 248 paragraph 1 letter d of the Labor Code).

5. Compressed work schedule

In case of temporary reduction of activity, for economic, technological, structural or similar reasons, for periods exceeding 30 working days, the employer will have the possibility to reduce the working hours from 5 days to 4 days per week, with the corresponding reduction of salary, until the situation that caused the reduction of the program is remedied, after prior consultation of the representative union at the level of the unit or of the employees' representatives, as the case may be (art. 52 paragraph 3 of the Labor Code).

From the analysis of this legal text – which states a useful situation – the following conclusions result:

- the case when the unilateral modification of the individual employment contract may occur is expressly regulated by law, respectively the temporary reduction of the activity for periods exceeding 30 working days; through such a legislative option – to prohibit the reduction of activity if the existence of the reasons does not exceed 30 working days – we appreciate that the possible abuses against the employee are prevented.
- the reasons that determine the reduction of the activity are also expressly legally stated (not being left to the discretion of the employer), respectively: the economic, technological, structural or similar ones. Therefore, there must be a real and serious cause when resorting to such a measure.
- as a measure of protection of the affected employees, the legislator established the need to consult the representative union at the level of the unit or of the employees' representatives, as the case may be; it is, however, an advisory opinion and not a compliant one.

We consider that such an obligation of consultation is opportune having the effect of avoiding the occurrence of employer abuses.

- the measure is temporary, respectively until the remedy that caused the reduction of the program is remedied.
- the contractual elements subject to modification are legally expressly highlighted, respectively only the work schedule and the salary.

6. The use of the unequal pandemic program in the sphere of labor relations

Full-time or part-time employees can benefit from the performance of work through an unequal work schedule. The concrete way of establishing this type of program within the 40-hour working week, as well as during the compressed working week will be negotiated through the collective labor agreement at the employer's level or, in his absence, will be provided in the internal regulations (art. 116 paragraph 1 of the Labor Code).

[10] See, compared to other types of situations that have generated economic difficulties, O. I. Dumitru, *The European Company, Perspectives after Brexit*, „Juridical Tribune - Tribuna Juridica", vol. 7, no. 2, 2017, p. 134-146.

The unequal work schedule can operate only if it is expressly specified in the individual employment contract (art. 116 paragraph 2 of the Labor Code).

7. The individualized program in the individual employment contract

A. In order to make a flexible organization of working time, the employer can establish individualized work programs – art. 118 para. 1 correlated with par. 2 of the same legal text of the Labor Code – in the sense that the daily duration of working time is divided into two periods: a fixed period in which staff are simultaneously at work and a variable period, mobile, in which the employee chooses his hours arrival and departure, in compliance with the daily working time (art. 118 para. 3 of the Labor Code).

However, we appreciate that the recourse to the individualized work program has the disadvantage of not being able to be provided for part-time employees – from the content of art. 118 para. 4 of the Labor Code, clearly showing the conclusion that it can be used only for full-time employees.

As a consequence, as a rule, the employer may establish individualized work schedules, with the consent or at the request of the employee concerned.

B. During the alert state, by derogation from the provisions of art. 118 par. 1 of the Labor Code, according to art. 21 of Law no. 55/2020, employers (from the private system/authorities and central and local public institutions/autonomous utilities/national companies[11]/companies in which the share capital is wholly or mainly owned by the state or by an administrative-territorial unit) with a number more than 50 employees can establish, without the employee's consent, individualized work programs.

The purpose of issuing the unilateral internal act by the employer is to ensure that, between employees, the existence of an interval of one hour at the beginning and end of the work schedule, in a period of 3 hours.

8. Suspension of the individual employment contract as an effect of technical unemployment

A. According to art. 53 para. 1 of the Labor Code, during the reduction and/or temporary interruption of the activity, the employees involved in the reduced or interrupted activity, who no longer carry out activity, benefit from an indemnity, paid from the salary fund, which cannot be less than 75 % of the basic salary corresponding to the job occupied, except for the situations provided in art. 52 para. 3 (compressed program).

During the reduction and/or temporary interruption, the employees will be at the disposal of the employer, who will always have the possibility to order the resumption of activity (art. 53 paragraph 2 of the Labor Code).

B. O.U.G no. 30/2020[12] refers to the employees of employers who reduce or temporarily interrupt the activity totally or partially as a result of the effects of the SARS-CoV-2 coronavirus epidemic, during the state of emergency/alert state, according to a statement on the employer's own responsibility.

During the state of emergency/alert for the period of temporary suspension of the individual employment contract, at the initiative of the employer as a result of the effects produced by the SARS-CoV-2 coronavirus, the allowances benefited by the employees: set at 75% job; is supported from the unemployment insurance budget, but not more than 75% of the average gross earnings (4072 lei) – art. XI alin. 1 of O.U.G no. 30/2020.

The technical unemployment benefit is not granted in the event that an employee has concluded several individual employment contracts, of which at least one full-time contract

[11] See C. Lefter, O. I. Dumitru, *Theoretical and Practical Aspects Regarding the Nullity of Commercial Company*, "Revista de Economie Teoretică şi Aplicată", no. 11/2009, p. 33-39.
[12] Published in the "Official Gazette of Romania" part I, no. 231 of March 21, 2020.

(therefore, not part-time) is active during the establishment of the state of emergency/state of emergency. alert (art. XI paragraph 9 of O.U.G no. 30/2020).

In the event that the employee has concluded several individual employment contracts and all are suspended as a result of the establishment of the state of emergency/alert, he benefits from the indemnity provided for the individual employment contract with the most advantageous salary rights[13] (art. XI para. 10 of O.U.G no. 30/2020).

C. The granting of the indemnities provided by the O.U.G. no. 30/2020 is also extended for the period between the cessation of the state of emergency and 31 May 2020, with the possibility of continuing after this date only in the areas where the restrictions will be maintained (art. 1 paragraph 1 of O.U.G. no. 70/2020[14]).

D. Art. 24 of Law no. 55/2020 establishes that the provisions of O.U.G. no. 30/2020 (including of the normative acts that modify and/or complete it or that include provisions regarding the application of its provisions), shall continue to apply, without interruption, from the date of cessation of the state of emergency for all fields of activity in restrictions are maintained until they are lifted, but no later than 31 December 2020.

9. Conclusions

Highlighting the legal regime applicable in the highlighted field allows the formulation of the following conclusions:

A. Both the context generated by the dynamics of the evolution of the national/international epidemiological situation and the general public interest required the adoption of measures designed to allow public authorities to intervene efficiently and with adequate means to manage the crisis.

B. A number of legal instruments have been created to prevent the application of the dismissal measure for reasons not related to the employee's person.

C. Exceptionally, it is possible to unilaterally modify the individual employment contract only in the cases and under the conditions provided by the legislation applicable in the alert state.

D. Given the serious impact on the economic[15] context, attempts are being made to take measures to prevent the termination of individual employment contracts.

Thus, as we have shown above, the employee has the possibility to choose between accepting a salary reduction – with the reduction of the working hours – or terminating the respective contract for reasons not related to his person (based on art. 65 of the Labor Code).

10. Proposals *de lege ferenda*

In a future regulation of the execution of the individual employment contract, we appreciate that the modification of some legal texts should be considered, of which – having an essential character – we highlight:

A. There are certain circumstances in which objective factors influence the possibility of performing the individual employment contract – in a certain unit – for a longer period of time.

Consequently, we consider that it would be necessary for the relevant legal provisions to expressly provide for the possibility of granting unpaid leave by the unit, with the agreement of trade unions or employee representatives (and not with advisory opinion), if for objective reasons it is necessary to reduce or temporarily interrupt the activity, for a maximum of 15-20 days per year. Likewise, it would be useful to expressly provide for the obligation to resume the activity –

[13] The rule of granting more advantageous salary rights is also provided by the legally recognized protection measures in case of posting (of art. 47 paragraph 2 of the Labor Code, according to which: During the posting the employee benefits from the more favorable rights, or from the rights of to the employer who ordered the secondment, or the rights of the employer to whom he is seconded).

[14] Published in the "Official Gazette of Romania" part I, no. 394 of 14 May 2020.

[15] To be seen C. Lefter, O. I. Dumitru, *Reglementarea desfăşurării activităţilor economice de către persoane fizice autorizate, întreprinderi individuale şi întreprinderi familiale în baza Ordonanţei de urgenţă a Guvernului nr. 44/2008 – între noutate şi controversă*, „Revista Română de Drept Privat" no. 1/2009, p. 104-116.

temporarily interrupted.

Such a possibility is no longer legally recognized.

B. In the context defined by the economic crisis, it would be useful to allow the employee to waive his rights established by the individual employment contract – but not those that have *ex lege* a minimum limit below which it cannot be lowered or a maximum ceiling.

It is normal for the employee not to be able to waive his rights enshrined in a source of law – normative act or collective bargaining agreement – but, based on freedom of will, it would be natural for the employee to be able to waive his rights resulting from individual bargaining.

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