THE SUBORDINATION OF THE EMPLOYEE TO THE EMPLOYER – THE FUNDAMENTAL LEGAL CHARACTERISTIC OF THE INDIVIDUAL EMPLOYMENT CONTRACT AND ITS CONSEQUENCES ON LABOR LAW

Associate professor **Brîndușa VARTOLOMEI**[1]

Abstract

Fundamental legal feature of the labor contract is the subordination of the employee to the employer. This is evidenced, during the execution of the labor contract of the employer rights granted much higher in comparison with those of the employee. Economic dependency is the objective support legal subordination of the employee to the employer.

Keywords: *employee, employer, individual employment contract, labor law.*

JEL Classification: *K12, K31*

1. Introductory considerations

Art. 10 of the Labour Code (Law no. 53/2003 with subsequent amendments[2]) defines the individual employment contract as "the contract under which a person, called the employee undertakes to perform work for and under the authority of an employer, natural or legal person, for a remuneration called wage[3]".

Although the Labour Code does not use, specifically, the concept of subordination of the employee to the employer, the clarification contained in the art. 10 relating to that employee undertakes to perform work "under the authority of an employer" means precisely its subordination to the employer. The use of the concept of authority by the legislature is not likely to change the problem because by "authority" means right, power, empowerment of command, to give orders or impose one's listening[4].

The individual labor contract is customized to any civil contract which involves performing a work by some characteristic features: Some common with those of civil contracts, others only specific contract[5]. Within the second category - the specific features individual labor contract - is fundamental subordination of the employee to the employer.

The legal subordination has as support the economic dependence of the employee to his employer.

---

[1] Brîndușa Vartolomei - Bucharest University of Economic Studies, Department of Law, brandusa_vartolomei@yahoo.com.

[2] Republished in Monitorul Oficial, part I, no. 345 from 18 may 2011.

[3] According to the Labour Code of 1972 "individual employment contract shall be in writing and shall include clauses required the person employed to perform their duties incumbent following the order and discipline of the law, the duty to provide reasonable accommodation unit for the purposes of work, pay to it in relation to their work and to grant other rights which it is entitled, and other terms determined by the parties "(art. 64). In juridical doctrine individual employment contract has been defined as a written agreement signed by a party - the employee – that is committed to provide with continuity in time the service and the work under the authority of the other party - the employer – that ensures, in turn, the salary and appropriate working conditions. See S. Ghimpu, I. T. Ştefănescu, Ş. Beligrădeanu, Gh. Mohanu, *Dreptul muncii. Tratat*, vol. I, Ed. Ştiinţifică şi Enciclopedică, Bucharest, 1978, p. 166.

[4] The Explanatory Dictionary of the Romanian language:

- The term "dependent" means "to be dependent situation, not to be autonomous, to depend on anyone; state of subordination, obedience "(p. 279);
- The term "subordination" means "action to subordinate, to make someone else to depend addictive" (p. 1034);
- The term "authority" means: "right, power, empowerment of command, to give orders or impose one's obedience" (p. 75). See Dicţionarul explicativ al limbii române, Academia Română, Institutul de Lingvistică „Iorgu Iordan", Ed. Univers Enciclopedic, Bucharest, 1998.

[5] See I. T. Ştefănescu, *Tratat teoretic şi practic de drept al muncii*, third edition revised and enlarged, Ed. Universul Juridic, Bucharest, 2014, p. 230-233; A. Ţiclea, *Tratat de dreptul muncii. Legislaţie. Doctrină. Jurisprudenţă*, eighth edition revised and enlarged, Ed. Universul Juridic, Bucharest, 2014, p. 346-347; M. Volonciu in Al. Athanasiu, M. Volonciu, L. Dima, O. Cazan, *Codul muncii. Comentariu pe articole. Vol. I. Articolele 1-107*, Ed. CH Beck, Bucharest, 2007, p. 35-50; Al. Athanasiu, L. Dima, *Dreptul muncii. Curs universitar*, Ed. All Beck, Bucharest, 2005, p. 25-29.

2. The economic dependency

The economic doctrine advances the idea that the relationship between worker and employer (employer) must have an interdependent nature. In other words, between these subjects as would be required to have a relationship "win-win" and not "win-lose". Between technical capital and cash belonging to the employer and human capital, labor, employee available, there should be a consensus. The profit of the employer should be made in consultation with the workers.

It is an axiom that - independent of social order - value, the employee creates through his work more than the consideration to be paid for this work. In other words, the difference between the real value of wage labor and recognized by the Contracting Party which is in a higher position in economic terms, thus ensuring the private sector, one of the important sources of profit employer in question.

Beyond economic concepts cannot ignore the fact that the employee is in a relationship of economic dependence on the employer. While the employee is only the owner of its workforce, the other party, the employer, is the owner of the technical capital and cash. In addition, if, for any reason, individual negotiation does not lead to termination of employment situation is substantially different employer having less to lose in relation to the employee that shows just lacked the necessary income to its daily existence.

Economic dependency relationship exists in both the public and private sectors. It lies ultimately in the very existence of wages, payment of labor as a source of securing the necessary daily living. That is why both internationally and nationally, through legal norms determining the amount of the minimum gross salary guaranteed payment.

In the private sector economic dependence of the employee has a more pronounced character in relation to the sector. In the public sector, employee work results are not commensurate concrete, based on strictly economic criteria. Salary is a matter of remuneration, other than economic criteria, respectively, depending on the financial resources of the state, the labor market requirements, the correlation with the private sector wages etc.

3. The legal subordination

Support economic dependence plays objective of legal subordination of the employee to the employer. But it is necessary to underscore the essential: without an adequate organization of work, without discipline, in terms of subordination cannot provide adequate social labor efficiency. In other words, legal subordination is not only support economic dependence; it finds its explanation in the social organization of labor inherent requirements. Therefore, a legal subordination of the employee to the employer, the entire functional hierarchy appears as an undeniable requirement that necessarily require. Specifically, the legal subordination expresses the position of the employee in legal relations with his employer; this position arising from individual labor contract is concluded and expressed at all stages of its existence.

At the conclusion of the individual labor contract in the process of negotiating individual subjects of law - employee future and the future employer - is on equal footing legal position is consistent altogether, rules of civil law. After the conclusion of this contract, the rights and obligations of the parties are interdependent - as in any other mutually binding contract - but have equivalent effect. Indeed, if the obligations of the parties are strictly interrelated, and are somewhat similar, employer's rights are superior in comparison with those of the employee, having its origin in the legal subordination to the employer.

Some clarifications are needed:

- subordination occurs in varying degrees in relation to economic dependence, the employee's position within the functional hierarchy and the nature of his profession;

- subordination is not limited to the direct relationship between the employee and the employer but also extends to employees who are on a higher level of functional and organizational hierarchy within the unit;

- in another aspect, legal subordination that appears to be different, inversely proportional to the level of qualification of employees.

The subordination can only be limited and strictly organizational components. This is the case, for example, the doctor who enjoy professional autonomy in the sense that treatment measures are chosen by himself, without the aid of others. But this does not remove the subordination medical professional autonomy in organizational components, to the leadership of the unit in which it operates training (according to Art. 406 para. 1 letter i of Law no. 95/2006 College in Romania controls how are respected by employers professional independence of physicians and their right of decision in respect of the medical). Likewise, if teachers cannot be imposed on the approach to discipline problems or certain views on issues in scientific dispute[6].

4. The effects that produces the legal subordination

Although legal doctrine looked over the decades, in many respects, legal subordination of the employee to the employer, not ever undertaken a comprehensive analysis of strictly legal repercussions in that it produces.

In our opinion, the legal subordination of the following consequences:

a) The existence of certain powers decisive employer relations with its employee's respectively organizational prerogative, the regulatory prerogative and disciplinary prerogative (art. 40 para. 1 of the Labour Code)[7].

b) The right of the employer to establish binding rules through specific sources of labor law represented by: Regulation of organization and functioning, internal rules and instructions on safety and health at work. Each spring in part regulates specific issues in employment legal relationships established between the employer and employees[8]. Obviously, in this case, the right employer prerogatives contained at the previous point.

c) The right of the employer, after the time of conclusion of the individual labor contract, to establish individual performance objectives (art. 40 par. 1 letter f of the Labor Code)[9].

---

[6] The best example of subordination is the only organization magistrates judges - special category of staff - who are not subordinate only to the law (Art. 124 para. 3 of the Constitution).

[7] Prerogative organization shall grant to establish, in terms of organizational and functional structures, and dispose of how to organize work in unity. Prerogative normative grants the right to issue internal rules and regulations of work, mandatory for employees. Prerogative disciplinary sanction shall grant the employees under the law. See I. T. Ştefănescu, *Tratat…*, *op. cit*., p. 232 and p. 318; M. Volonciu in Al. Athanasiu, M. Volonciu, L. Dima, O. Cazan, *op. cit*., p. 50; A. Ţiclea, *op. cit.*, p. 348; C. Nenu, *Contractul individual de muncă*, Ed. CH Beck, Bucharest, 2014, p. 80-86.

[8] Rules of organization and functioning of the internal act is a legal person - the employer - that establish, under the law, its overall structure, working compartments - production or functional (workshop, station, factory, office, division, directorate, department etc.) and their powers, the way of cooperation, relations with the leadership of the legal person.

Internal Rules is a legal act adopted by the employer to employees represented by the advisory opinion of the union or otherwise provided by law, by representatives of the employees, setting out at least the following:

a) rules on the protection, hygiene and safety in the establishment;

b) rules on the removal of discrimination and all forms of violation of dignity;

c) the rights and obligations of employers and employees;

d) the procedure for handling requests or complaints of individual employees;

e) practical guidelines on unit labor discipline;

f) disciplinary offenses and penalties;

g) rules relating to disciplinary proceedings;

h) the modalities for the implementation of specific contractual or other legal provisions;

i) criteria and procedures for training employees "(art. 241 in conjunction with Art. 242 of the Labour Code). Guidelines on occupational safety and health are documents prepared by the employer to complete and / or application of regulations on health and safety at work, taking account of the specific activities and existing jobs at the school level (art. 13 letter e from Law no. 319/2006 and art. 15 pt. 3 of the Government Decision no. 1425/2006).

[9] Individual performance objectives are those quality standards established unilaterally by the employer on the basis of art. 40 para. 1 letter f of the Labor Code, possible to apply both senior employees and those with executive positions in the latter case only to the extent that their work depends on the quality of products, services or works performed / executed by the employer. See B. Vartolomei in I. T. Ştefănescu (coord.), M. Gheorghe, I. Sorică, A. G. Uluitu, B. Vartolomei, A. Vidat, V. Voinescu, *Dicţionar de drept al muncii*, Ed. Universul Juridic, Bucharest, 2014, p. 261-262.

It must be emphasized that, in relation to individual performance objectives, the legal doctrine formulated partly different views:

- in the first opinion was held that "appears unnatural, in obvious conflict with the other provisions of the Labour Code (...) that such an assessment (performance targets) is an exclusive prerogative of the employer" and that "they should be included in individual employment contract (job description attached to the contract)[10];

- the second opinion stated that "work rate is the legal instrument available to the employer to establish performance objectives, otherwise to require its employees as a time determined to achieve a given workload[11];

- in a third opinion with which we agree, is considered "art. 40 para. 1 letter f of the Labor Code states the employer's right and not an obligation to establish its individual performance targets for all employees, for their part, or none of them "and they" should not be confused with any job and any individual-time work because they aim par excellence quality component of work, obtaining superior results[12].

d) The ability of the employer to undertake unilateral changes to contract terms regarding the place of work and type of work or as a result of delegation or secondment in accordance with the provisions of the Labour Code, for the first time when they can be ordered (60 days if delegation and maximum 1 year for posting), unilateral acts of the employer[13], whether as a result of the application of art. 48 of the Labour Code, if the occurrence of a force majeure, as a disciplinary sanction (for sanction of relegation) and as protection for the employee.

e) The right of the employer to suspend the individual employment contract for cases provided for by art. 52 of the Labour Code in question: during the preliminary disciplinary research; if the employer has filed a criminal complaint against the employee or he was prosecuted for criminal acts incompatible with his position until a final judgment (a); if temporary discontinuation or reduction of the activity without termination of employment, for economic, technological, structural or similar (b); if the employee has been taken against the provisions of the Code of Criminal Procedure, the extent of judicial control or judicial control on bail, if it were established pregnancy obligations prevent the execution of the employment contract and if the employee is arrested home and contents measure prevents performance of the contract of employment (c); During the deployment (d); and, during the suspension by the competent authorities of permits, authorizations or certificates required for professions (e). No doubt the employee may suspend the individual employment contract under Art. 51 para. 1 of the Labour Code. But, the suspension is not an expression of its legal subordination but rather an opportunity granted by the legislature to balance relations between the parties in the contract.

f) The right of the employer to have the provision by employees of overtime in accordance with Art. 120 para. 2 of the Labour Code, if an intervention force majeure or urgent works intended to prevent accidents or to eliminate the consequences of an accident.

g) The existence of the so called "raport de prepuşenie" between employer and employee which takes effect on civil legal relationship and is born to third parties harmed by the servant (art. 1373 par. 1 of the Civil Code)[14]. Legal support of "raportul de prepuşenie" is the subordination of the employee to the employer.

h) Contractual risk is always borne by the employer because:

---

[10] See Ş. Beligrădeanu, *Principalele aspecte teoretice şi practice rezultate din cuprinsul Legii nr. 40/2011 pentru modificarea şi completarea Codului muncii II*, in R.R.D.M. no. 3/2011, p. 33.

[11] See A. Ţiclea, *Tratat…*, *op. cit.*, p. 463.

[12] See I. T. Ştefănescu, *Tratat…, op. cit*., p. 321.

[13] In accordance with art. 43 of the Labour Code "delegation is to exercise temporary order of the employer, the employee, the relevant tasks works or duties outside his workplace". According to art. 45 of the Labour Code "is the act of posting the temporary change of employment, the employer's disposal, to another employer for the execution of works on his (...)".

[14] The principal (employer) is obliged to repair the damage caused by his servant (employee) whenever the offense committed by him related to the duties or functions assigned order. In relation to third parties, the employer is obliged to assume liability for the acts committed by its employee injurious under the rules of the Civil Code, they are expected to recover damage under rules of the Labour Code, through economic responsibility (liability specific contractual legal relationship working time), which is a solution different from civil law.

- If the debtor to work, the employee does not perform work due to force majeure or unforeseeable circumstances, the employer has no obligation to pay his salary, becoming common law rule applicable under the provisions of art. 1557 par. 2 in conjunction with art. 1634 par. 3 of the Civil Code;

- If the debtor to ensure appropriate working conditions - the employer - not running due to a force majeure or unforeseeable circumstances, he is obliged to pay an indemnity of payroll cannot be less than 75 % of basic salary (according to art. 53 of the Labour Code).

i) An employee may refuse to execute the individual employment contract even if the employer fails to fulfill its obligations (for example, if the employer does not fulfill the obligation to pay wages). Therefore, the employee is not entitled to invoke the exception of *non adimpleti contractus* as a civil contract between two parts. It can, however:

- to sue the employer's for his obligation to perform its correlative;

- to have individual employment initiative terminated by agreement of the parties (art. 55 b of the Labour Code); and, ultimately,

- to end the legal relationship of employment by resignation without notice (art. 81 par. 8 of the Labour Code).

j) The right of the employer to proceed with disciplinary sanctions if the employee performs with guilt, misconduct by affecting the legal norms, internal regulations, individual employment contract or collective agreement applicable orders and legal provisions hierarchical. It is pointed out that although the specialty doctrine maintains that disciplinary liability is a specific legal form of labor law (in the narrow sense of labor law), in reality, it occurs in all cases where there are legal relations work, regardless of their source, if the work is in providing a legal subordination relationship (such as, public officials, cooperative, etc.).

k) The existence of labor law as an autonomous branch of law in relation to civil law. Ensemble specific features of individual labor contract labor places as autonomous branch of private law in relation to civil law, between these traits fundamental role starring legal subordination of the employee.

l) The ordination of special measures to protect the employee because the employee as a result of subordination to the employer, the chief benefit from protection rules favorable to the employer did not act improperly or discretionary. However, as demonstrated in recent years, reception and implementation of flexicurity principles not removed, but only diminished to a certain extent, the character of protective labor legislation.

Relatively recent, the doctrine[15] advocated in another area of private law that: "In order to justify the disappearance of commercial law or commercial material need to change the name is invoked in general that tier system adopted under the Civil Code, commercial law no longer meets the criteria imposed by the legal division of the branches of law rules.

Concept on these criteria, recognized as sacrosanct in the past, has long exceeded, both we and the European legal doctrine. Economic needs of modern society have won recognition long competition law, banking law, insurance law, transport law, etc. It is a debatable opinion. In reality, the criteria for delimiting the branches of law, under the law, retains the timeliness and significance presents both a practical and theoretical. Otherwise, if it did not operate these criteria legal system would turn into an amalgam of public law and private law, a conglomerate illogical.

It is true that, generally, the Western doctrine does not operate with the notion of branch of law but is known and established legal concept of discipline. It is incomprehensible that would be an outdated concept demarcation criteria branches of law. Branch of law refers to a set of legal rules that are circumscribed by their specific, even by the legislature. Sub-branches of law are the legal disciplines. In this context, there are legal disciplines:

[15] See S. D. Cărpenaru, *Tratat de drept comercial român. Procedurile de prevenire a insolvenţei şi de insolvenţă*, fourth edition updated, Ed. Universul Juridic, Bucharest, 2014, p. 21.

- Which are a creation of the law itself, and which are divided into independent disciplines who have a branch of the common law (such as constitutional law, criminal law) and self-discipline that branch of law as common law (such as the right work in relation to civil law);

- Which are sub-branches of law and often bearing the previous name they had when, actually, were branches of law (as were commercial law, family law, private international law);

- Which have never been and is not now any branch of law (such as transport law, banking law);

- Which are a creation doctrinal and legal institutions covering various branches of law (such as business law).

Defining the contract between the parties as individual employment contract does not depend on the willingness of these or name or the qualification that they give their agreement, but the actual conditions, in fact, the work is being carried. In case of doubt, proof of legal subordination of the employee to the employer and, in this way, and the existence of the employment contract, may result from a combination of factors that constitute concordant presumptions which are to infer the existence of this subordination. It made such radical difference between an employee party to a contract of employment and a worker, service provider, part of a civil contract. Legal subordination does not imply rigid and immutable criteria. The realities of subordination must be analyzed according to the busy work of the employee within the organization and the work which he actually exercises. It is devoid of significance that the bond of subordination is to be specified by contract or resulting only from the actual conditions of work.

In practice, in order to identify the existence of an individual employment contract is necessary to consider whether[16]:

- Work is carried out principally and regularly, according to a particular work program established by the employer;

- The employee is under the authority of the employer who gives orders on labor supply control their fulfillment and check the results of the employee concerned;

- The employer employee work forcing to exercise service obligations in a particular job and under specific conditions;

- The person who performs the work is obliged to obey the rules and wear that apply within the organization regarding working hours, labor discipline and the orders they receive from the employer.

- Duties of the person providing employment are determined by a job description[17];

- Regular paid work performed periodically (rhythmic), payment is at least equal to the minimum gross salary guaranteed payment.

- A person who works has, as the case of housing service, car, other work tools;

- There is a relationship to the principal employer servant characterized by the power to give orders his employee who is required to comply with the application by the employer under the spectrum of disciplinary sanctions;

- Wording contained in the written decision to dismiss is indicative of qualification relationships between the parties as an employment relationship (with source in an employment contract).

The above items are required to be combined with each other. In other words, for example, only the existence of a fixed timetable can not be an element of legal subordination.

In conclusion, if the person has the right to refuse work that is offered if there is a program of work required, if free to come to work according to its choice, if the work is not fully available

[16] Recommendation O.I.M. no. 198/2006 states for the first time after many years of negotiation, legal subordination as a fundamental feature of the employment relationship. At EU level, however, there is not a corresponding document. Therefore, on many occasions, the European organization have drawn the attention of Member States to comply with the prescriptions contained in the ILO Recommendation no. 198/2006.

[17] Although the job description is not an expression of legal subordination because, pursuant to art. 17 para. 3 letter d of the Labour Code, it is negotiated by the employer to the future employee, the job description details, in fact, the objective of the individual employment contract.

employer if payment is not successive and not made at predetermined intervals, cannot speak of an individual contract of employment.

The role of analyzing whether or not they met the criteria attesting to the legal subordination returns according to legal norms:

- Labor inspection bodies;
- The tax authorities of the Ministry of Finance;
- Courts.

5. Conclusions

From the above it clearly emerges that legal subordination is intended to define the legal relations of the civil work and emphasize the specificity of labor law as an autonomous branch of law. In this context the Labour Code expressly establishes at art. 2 that its provisions are applicable to legal relationships based on the conclusion of an individual employment contract and in art. 278 it completes, if necessary and possible, with the rules of civil law, the common law, unless inconsistent with the specific legal relations work. So far labor law should be regarded as an autonomous branch of law, with the object and its method of regulation that interferes with civil law only in so far as labor law there special provisions derogating from the rules of civil law.

Legal subordination same legal consequences as between employer and employee, all of which make up the specific content of individual employment contract.

Bibliography

1. S. Ghimpu, I. T. Ştefănescu, Ş. Beligrădeanu, Gh. Mohanu, *Dreptul muncii. Tratat*, vol. I, Ed. Ştiinţifică şi Enciclopedică, Bucharest, 1978,
2. I. T. Ştefănescu, *Tratat teoretic şi practic de drept al muncii*, third edition revised and enlarged, Ed. Universul Juridic, Bucharest, 2014 ;
3. A. Ţiclea, *Tratat de dreptul muncii. Legislaţie. Doctrină. Jurisprudenţă*, eighth edition revised and enlarged, Ed. Universul Juridic, Bucharest, 2014;
4. Al. Athanasiu, M. Volonciu, L. Dima, O. Cazan, *Codul muncii. Comentariu pe articole. Vol. I. Articolele 1-107* Ed. CH Beck, Bucharest, 2007;
5. Al. Athanasiu, L. Dima, *Dreptul muncii. Curs universitar*, Ed. All Beck, Bucharest, 2005;
6. C. Nenu, *Contractul individual de muncă*, Ed. CH Beck, Bucharest, 2014;
7. I. T. Ştefănescu (coord.), M. Gheorghe, I. Sorică, A. G. Uluitu, B. Vartolomei, A. Vidat, V. Voinescu, *Dicţionar de drept al muncii*, Ed. Universul Juridic, Bucharest, 2014;
8. Ş. Beligrădeanu, *Principalele aspecte teoretice şi practice rezultate din cuprinsul Legii nr. 40/2011 pentru modificarea şi completarea Codului muncii II*, in R.R.D.M. no. 3/2011.