

# VULNERABILITY OF PART TIME EMPLOYEES

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## **Abstract**

*The employee who concluded a part-time contract is the employee whose normal working hours, calculated weekly or as monthly average, is lower than the number of normal working hours of a comparable full-time employee. Part-time workers generally have the same legal status as full time workers. In fact, the vulnerability of this category of workers is not necessarily legal but rather economic: income - in proportion to the work performed, may be insufficient to cover the needs of living. However, such vulnerability may also have a certain cultural component: in some societies, professional identity is determined by the length of working hours. Also, part time work may hide many types of indirect discrimination. As a result, the part-time contract requires more than a protective legislation: it requires a strategy. This paper proposes a number of milestones of such a strategy, as well as some concrete de lege ferenda proposals.*

**Key words:** *Employment contract, part-time, comparative law, Labour Code*

**JEL Classification:** K31

## **1. Preliminary considerations**

While part-time work was initially used more as a way to supplement income (as a second job), in the last decades of the past century it became a wide phenomenon. Part-time work gradually became in many cases the only activity carried out by the employee - often an alternative to unemployment. The European legislator's reaction was to adopt Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time working – which requires that part-time workers be granted, proportionally, the same rights as full time workers: “in respect of employment conditions, part-time workers shall not be treated in a less favourable manner than comparable full-time workers solely because they work part time unless different treatment is justified on objective grounds. Where appropriate, the principle of *pro rata temporis* shall apply”.

Similarly, a study conducted by the International Labour Organisation - before the economic crisis – emphasizes the importance of part-time contracts for combining family and professional life, especially for young people, the elderly and women<sup>2</sup>. Moreover, regarding part-time work the International Labour Organisation adopted Convention no. 175/1994 and Recommendation no. 182/1994 on part-time work.

As regards European Union policies after the end of the economic crisis, we can say that they are favourable to part-time contracts. For example, the European Commission' Communication of 2012, based on European Union 2020 Strategy “Towards a job-rich recovery”<sup>3</sup> states, referring to the period of the economic crisis: “Although short-time working arrangements often reduced productivity somewhat, they nevertheless helped maintain skills, employment and confidence and their costs have been generally lower than the cost of unemployment benefits”. As far as we are concerned, we consider that this is the “lesser evil” approach, in the sense that this type of contract is encouraged because it is seen as a better alternative to unemployment.

Moreover, the percentage of employees working part-time (as the main employment contract) compared to the overall European employees increased in the decade between 2004 and 2014 from 16% to 19.6%. The highest proportion of part-time workers can be found in the Netherlands (50%), followed by Germany, Austria, Great Britain, Denmark, Sweden, Belgium and Ireland. On the contrary, part-time work is rarely reported in Bulgaria (2.5%) and Slovakia (4.5%).

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<sup>2</sup> Lee, S.; McCann, D., Messenger, J.C., *Working Time Around the World: Trends in working hours, laws, and policies in a global comparative perspective* (London and Geneva, Routledge and ILO), - [http://www.ilo.org/wcmsp5/groups/public/---dgreports/---comm/documents/publication/wcms\\_082838.pdf](http://www.ilo.org/wcmsp5/groups/public/---dgreports/---comm/documents/publication/wcms_082838.pdf), (accessed in 15 October 2015), 2007, p. 99.

<sup>3</sup> <http://ec.europa.eu/social/main.jsp?catId=89&langId=en&newsId=1270&moreDocuments=yes&tableName=news> (accessed in 15 October 2015).

During the decade 2004 – 2014, Romania reported almost constant data, ranging from 8,8 to 9,1% of part time contracts<sup>4</sup>.

## 2. Vulnerability indicators

Part-time workers generally have the same legal status as full time workers. In fact, the vulnerability of this category of workers is not necessarily legal but rather economic: income - in proportion to the work performed, may be insufficient to cover the needs of living. However, it also has a certain cultural component: in some societies, professional identity is determined by the length of working hours, while in others it is independent of it<sup>5</sup>. The more socially desirable a long duration of the working day is considered, the more disadvantageous social position part-time workers will have.

But not any kind of part-time contract is relevant - as a-typical form of work. The crucial distinction here is between:

(a) Voluntary part-time work, an expression of free choice. In this case, the part-time contract is for example a form of reconciling work and family life, a free expression of the will that does not raise any special concerns regarding protection;

(b) Involuntary part-time work<sup>6</sup>, an agreement that is a compromise for the worker who failed to get a full-time job. In this case, it is not the option of the employee to conclude such a contract, but only a solution (temporary, as intended) due to the lack of jobs<sup>7</sup>.

That is why a number of additional indicators were needed, focusing on the motivation for choosing such a contract: is it a free choice or is it determined by circumstances beyond the control of the worker? Statistics show that for example in 2014, over a quarter (27.1%) of the number of people working part-time in the European Union declared themselves available to work more hours than currently working, being considered **underemployed**<sup>8</sup>.

Faced with these statistical realities the question arises as to whether European policies aimed at encouraging part-time contracts are truly intended to protect the interests of workers and promote the declared need to "reconcile professional and personal interests". If these contracts are transient in a worker's career, what trend do they express? **Are they milestones on the road to full-time employment or to unemployment?**

Additionally, underemployment is not only about the actual number of hours worked, but it is also related to the overall feeling of dissatisfaction with the work performed. Part-time workers seldom get management positions, having little chances for promotion, or carry out activities that are below their actual level of qualification<sup>9</sup>. Lower odds of promotion of part-time workers in Romania are likely to be also influenced by the legal prohibition for them to work overtime (part-time workers

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<sup>4</sup> European Labour Force Survey, [http://ec.europa.eu/eurostat/statistics-explained/index.php/Employment\\_statistics#Part-time\\_and\\_fixed-term\\_contracts](http://ec.europa.eu/eurostat/statistics-explained/index.php/Employment_statistics#Part-time_and_fixed-term_contracts)

<sup>5</sup> For a discussion on the differences between France and the United States in this regard, see Sandor, E., *Part-time work in Europe. European Company Survey*, European Foundation for the Improvement of Living and Working Conditions, Publications Office of the European Union, Luxembourg, 2011, p. 13 and 25.

<sup>6</sup> The concept is defined as representing those contracts concluded by the employees who, if they had the opportunity, would have chosen full time employment. The criterion is rather subjective and statistical data are an approximation. The concept of "under-employment" is also used to mean hiring a person for a number of hours less than what they would have liked and are available to work. For the distinction voluntary/involuntary work, see also I.T. Ștefănescu, *Tratat teoretic și practic de drept al muncii [Theoretical and practical treatise on labour law]*, Universul Juridic, Bucharest, 2014, p. 536.

<sup>7</sup> For example, the data released by OECD reveals that in the year 2013, 28.8% of French part-time workers would have actually preferred a full-time contract. In Germany, the percentage is only 12.6%, while in Greece the percentage of involuntary part-time work went up to 41.8%, in Portugal to 42.6% and in Italy to 43.5%. [http://stats.oecd.org/Index.aspx?DataSetCode=INVPT\\_1](http://stats.oecd.org/Index.aspx?DataSetCode=INVPT_1), (accessed in 15 October 2015).

<sup>8</sup> To note here that in addition to part-time employees there are other categories of underemployed (available to work more). One example is workers on zero hours contracts, providing work only at the request of the employer, and which, lacking any guarantee for such a request - and therefore income - are in a position that is even more susceptible to economic insecurity than part-time employees (the latter having though the certainty of a number of hours per month, hence a certain income).

<sup>9</sup> For example, in Great Britain, 51% of the employees (women and men) hired part time said that the work performed is below their full potential. Sandor, E., *op. cit.*, p. 7.

being thus unable to take part alongside their full-time colleagues in the effort to overcome difficult moments for the company).

Such a distinction can be correlated with the one between part-time employment contracts with a marginal character and those with a substantial nature. This classification covers not only the number of hours worked, in absolute terms, but also how the worker subjectively relates to these hours: treating them as the main activity or as a financial supplement and an activity that is complementary to - for example - that of caring for their own household? Another indicator that is used in this area is the percentage of part-time contracts which are maintained under the same conditions, in the following year. If this percentage is small, it can mean two things:

- a) on the one hand, the employee did not want part-time work and, as soon as another opportunity became available, he took full-time employment;
- b) that during the economic crisis, part-time employees (often women, young people or immigrants) face redundancy in greater measure than standard employees.

**This brings us to the core of the vulnerability of part-time workers.** Discrimination against them, otherwise prohibited by Directive 97/81, often obscures discrimination on other criteria, because part-time employees are often women, young people, persons with disabilities, and other people on the margins of the labour market that would accept any contract to avoid unemployment.

However, quantitative aspects have their own importance. Thus, some legal systems introduce a new distinction, according to the fraction of the working time. For example, in the German system, activities of short duration ("mini-jobs") that lead to an income of less than 400 euros per month have distinct regulations. A working week of less than 10 hours is included in this category of non-standard contracts (*Geringfügige Beschäftigung*). These workers operate mainly in agriculture, food and health industries and are not generally covered by collective labour agreements. Among all categories of employees working part-time, this category (comprising 65% women) is deemed to require the most attention because of the risk of precarious employment and decreased social security. The same system of "mini-jobs" can be found in Slovenia, where the law defines them in relation to the number of working hours (up to 40 per month) and the salary (maximum 50% of the minimum wage).

The quantitative aspect of part-time contracts opens the door to other potential discrimination. Would it be possible to argue that Directive 97/81 prohibits discrimination not only between part-time workers and those employed full-time, **but also between employees with a smaller fraction of working time and those with a higher fraction?**

One such problem arose in Case C-393/10 *Dermond Patrik O'Brien*<sup>10</sup>, the Court of Justice of the European Union being faced with the question: is national law stopped by the Directive from achieving a distinction

- a) between full time workers and part-time workers or/and
- b) between different categories of part-time workers, regarding the right to pension?

In the case, Mr. O'Brien was hired to work a minimum of 15 days per year, the employer having the possibility to request more, if necessary. However, this contract had not generated pension rights, according to national law, which otherwise were recognized to part-time employees hired to provide a minimum number of weekly hours. The solution of the Court was rather ambiguous; it confined itself to reiterate that any difference in treatment must be justified by objective reasons, which is to be assessed by the national court.

The margin of freedom enjoyed by the national legislator appears to be large, being able to assess the limit beyond which the fraction of the time is enough to justify the application of a particular legal regime. Moreover, according to art. 2 (2) of the Directive, member states may, for objective reasons, exclude entirely or partly from the terms of the agreement part-time workers who work on a casual basis.

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<sup>10</sup><http://curia.europa.eu/juris/document/document.jsf?text=&docid=119901&pageIndex=0&doclang=RO&mode=lst&dir=&occ=first&part=1&cid=459605> (accessed in 15 October 2015).

### 3. Regulation of the part-time contract in Romanian law

The employee who concluded a part-time contract<sup>11</sup> is the employee whose normal working hours, calculated weekly or as monthly average, is lower than the number of normal working hours of a comparable full-time employee. The comparable employee is the full-time employee in the same establishment, having the same type of individual employment contract, providing the same or a similar activity to that of the worker hired with part-time individual employment contract, taking into account other considerations as well, such as seniority and qualification/vocational skills. If there is no comparable employee in the same establishment, then the provisions of the applicable collective labour agreement or, in the absence of such an agreement, legal regulations in the field are considered.

The Labour Code no longer contains a minimum number of working hours, employee status being determined by other criteria, independent of the actual working time, such as the dependent nature of the work performed by the employee and the continuity of this work<sup>12</sup>.

On the contrary, other legal systems include such minimum thresholds. For instance, Belgian law provides that the employment contract may be concluded with a number of hours that may not be less than 1/3 of the weekly working hours of an employee working full time, belonging to the same professional category. In addition, as a rule, no period may be less than 3 hours, although special laws provide exceptions<sup>13</sup>.

Performing work for a shorter period than 8 hours per day or 40 hours per week leads to the applicability of a legal regime of employees different in many respects. Without making a thorough analysis of this type of contract, we note, however, that employees with part-time employment contracts have two categories of rights:

- Rights deriving from their status of being an employee, which are not subject to proportionality<sup>14</sup>;
- Rights that are granted in proportion to the actual working time<sup>15</sup>.

From the perspective of identifying trends to increase flexibility of employment relationships, the provision contained in article 107 of the Labour Code should be emphasized. It requires the employer, as far as possible, to take into account the requests of employees to be transferred from a full-time job to a part-time one or from a part-time job to full-time employment or to increase their working time, should such an opportunity arise. This provision is consistent with that contained in art. 18<sup>16</sup> of Recommendation no. 182/1994 of the International Labour Organisation on part-time work. We note that the provisions of the Recommendation go further than the Romanian law,

<sup>11</sup> For an analysis of this variety of contract, see, I. T. Ștefănescu, *op. cit.*, p. 535 – 542; Al. Țiclea, *Tratat de dreptul muncii. Legislație. Doctrină. Jurisprudență* [Treatise on Labour Law. Legislation, Doctrine. Case law], Universul Juridic, Bucharest, 2014, p. 369-372; M. Volonciu, în Al. Athanasu, M. Volonciu, L. Dima, O. Cazan, *Codul muncii. Comentariu pe articole* [The Labour Code. Comments by article], Ed. CH Beck, 2007, p. 519 – 536; O. Ținca, *Observații referitoare la contractul individual de muncă cu timp parțial* [Notes on the part-time individual employment contract], in „Revista română de dreptul muncii” [Romanian Journal of Labour Law], no. 5/2008, p. 63-71; M. Gheorghe, *Contractul individual de muncă cu timp parțial în noua sa reglementare* [The part-time individual employment contract as newly regulated], in „Revista română de dreptul muncii” [Romanian Journal of Labour Law], no. 4/2006, p. 74 – 78; A.G. Uluitu, *Aspecte noi privind contractul individual de muncă cu timp parțial* [Aspects concerning the part time employment contract], in „Revista română de dreptul muncii” [Romanian Journal of Labour Law], no. 4/2006, p. 70 – 74; A. Ștefănescu, R. Oprea, *Considerații privind „salariatul cu fracțiune de normă”* [Notes on the „part-time employee”], in „Revista română de dreptul muncii” [Romanian Journal of Labour Law] no. 8/2011, p. 64-82. a.o..

<sup>12</sup> See, A.G. Uluitu, *op. cit.*, p. 73.

<sup>13</sup> J. Buelens, J. Pearson (eds.), *Standard work: an anachronism?*, Ed. Intersentia, 201, p. 26.

<sup>14</sup> Thus these are: the right to equality of opportunity and treatment, the right to dignity at work, the right to safety and health at work, the right to access to vocational training, the right to information and consultation, the right to take part in the determination and improvement of working conditions and the working environment, the right to protection in case of dismissal, the right to collective bargaining, the right to participate in collective action, the right to form a union or to join a union, etc.

<sup>15</sup> The right to salary and other benefits. The right to paid leave is no longer part of this category of rights, but only the right to adequate compensation.

<sup>16</sup> “(1) Employers should consider: (a) the requests for transfer of full-time workers in part-time jobs that become available in the undertaking; (b) the requests for transfer of part-time workers into full-time positions that becomes available in the undertaking. (2) Employers should provide workers, in due time, information on part-time and full-time positions available in the undertaking in a way that facilitates the transfer from a full-time job to part-time employment or the other way round”.

requiring the employer to accept the request of the employee to be transferred from a full time job to a part-time job, if this request is soundly motivated<sup>17</sup>.

Some systems of law also provide the correlative right for persons employed part-time to take full-time employment, if a full-time position according to their qualification is vacated at unit level. Thus, for example, when hiring for a full-time job, the Belgian law gives priority to the part-time worker already employed in the unit – over a candidate from outside the unit, in conditions of identical training<sup>18</sup>. The Finnish system goes a step further than that by requiring the employer to provide training for part-time employees in order to facilitate the transition to full time jobs (surely if there are such jobs vacant within the unit)<sup>19</sup>.

Regarding part-time employment contracts, it must be pointed out that (unlike other legal systems) implementation of Romanian legislation referring to the number of workers is done in respect to persons, not working hours<sup>20</sup>.

Some practical difficulties are raised by art. 105 para. (1) c) of the Labour Code, which prohibits part-time employees from working overtime except in cases of force majeure or for other urgent works to prevent accidents or to minimize their consequences. As the workload often fluctuates, we believe that this ban is an additional obstacle in the way of internal flexibility. If the part-time employee, despite this prohibition, is still providing – at the employer's request – extra hours, the legal regime of these hours will be fully implemented (art. 120-124 of the Labour Code), but the deed of the employer will be considered an offense under art. 260 para. (1) i) of the Labour Code.

With the exceptions provided in art. 103-107 of the Labour Code, all other regulations equally apply to full-time or part-time employees<sup>21</sup>.

#### 4. Conclusions

The part-time contract requires more than legislation prohibiting discrimination: **it requires a strategy**. Based on studies regarding the voluntary or non-voluntary conclusion of this type of contract, the Romanian legislator shall have to make a decision: choose to encourage or to discourage this type of contract? The decision is not easy, because the reasons behind such contracts (mediated causes of part-time contracts) can be extremely diverse. The main question that arises is whether part-time work is the first step towards full-time employment or, conversely, part-time contracts (the "mini-jobs" so popular in today's Europe) actually erodes the foundation of the standard contract.

The vulnerability of part-time employees, be it economic or expressed in terms of identity, as manifestation of indirect discrimination that these contractual terms hide, is not as obvious as in the case of other non-standard contracts. Precarious work is usually associated with fixed-term employment contracts, this being a more frequent subject for analysis and concern at national and European level. Moreover, some authors do not even include part-time work among categories of non-standard contracts because it does not contain the germ of insecurity that characterize a-typical work, and the actual duration of the working day would not, by itself, be decisive when it comes to relating to the standard.

However, it can be considered that between standard employment contracts and part-time employment contracts there is not only a quantitative difference (how many hours of work involve each), but also a qualitative difference (what kind of workers conclude such contracts). We will find

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<sup>17</sup> The reasons referred to in the Recommendation are: pregnancy or the need to care for a small child or a disabled or sick member of the family, as the subsequent return to full time employment.

<sup>18</sup> Jan Buelens, Kelly Reyniers, *Standard and non-standard work in Belgium*, in J. Buelens, J. Pearson (eds.), *op. cit.*, p. 19.

<sup>19</sup> Jari Hellsten, *Standard and non-standard work in Finland*, in J. Buelens, J. Pearson (eds.), *op. cit.*, p. 44.

<sup>20</sup> For example, a redundancy will be collective if it involves at least 10 employees (out of a total of less than 100, according to art. 68 para. 1 letter a) of the Labour Code) and the fact that the 10 employees might be all part time workers, while full-time employees are not laid off, is irrelevant. Or negotiation for a collective labor agreement will be mandatory if the unit has more than 21 employees, be they employed part-time (according to Art. 129 of the Social Dialogue Law no. 62/2011).

<sup>21</sup> For example, the damage caused by the employee to the employer may only be recovered in rates that will not exceed one third of the net monthly salary, whether it corresponds to a full-time or part-time contract of employment.

that the labour force that tends to conclude part-time contracts is the exact same which presents structural vulnerabilities anyway: women, the young, people at the end of the career, immigrants. Therefore we consider that it may not be presumed, in the absence of empirical data, that concluding part-time contracts is a free choice, with no economic constrains. Only on the basis of such analysis, national and European policies should be developed in the direction of encouraging or, conversely, discouraging this contractual formulas.

So far, within the Romanian law, as *lege ferenda* proposal, we emphasize the idea that greater flexibility in the labour relationships of these workers could be fostered by eliminating the prohibition for the provision of overtime by part-time employees, hours that should have the same legal regime as overtime performed by full-time workers, attracting appropriate compensation with free time and if this is not possible, adding an extra pay, under art. 123 para. (1) of the Labour Code.

We also believe that the disadvantage felt by part-time employees could be reduced by requiring a minimum number of working hours to be provided at one stretch. In other words, regardless of the fraction of the time, the employee should not be required to carry out work for less than two continuous hours during one working period. We are making such a proposal taking into account the fact that - at least for now - travelling to work is not considered working time, and the employee who comes to work for a period that is shorter than two hours might spend a disproportionate time travelling than actually working (and being paid).

Finally, we propose the amendment of Art. 107 para. (1) of the Labour Code (which currently has rather the character of a recommendation<sup>22</sup>) for the purpose of taking over in our law the provisions of comparative law establishing real priorities for the part-time employee to take up full time employment, when a full time job becomes vacant in the unit, to the extent that the job corresponds to the employee's training.

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<sup>22</sup> The text provides, among other things, that the employer is required, as far as possible, to take into account the requests of employees to transfer from part-time job to full time job, should such an opportunity arise.