

# Particularities of the employment contract of the professional foster carer in Romania

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## *Abstract*

This paper assesses certain aspects regarding the establishment of the employment contract for the professional foster carer from the perspective of internal and international norms, legal practice (internal, ECHR, CJEU), which characterize this type of employment contract for the purpose regulation thereof, namely the requirements and needs of children in foster care. The legal framework on the exercise of the foster carer profession stipulated by Government Decision (GD) 679/2003<sup>2</sup> brings into effect the provision of art. 62, section 1, let. b of Law no. 272/2004<sup>3</sup> on the protection and promotion of the rights of the child. In the following, we shall identify the non-exhaustive particularities of the employment contract for the professional foster carer that justifies the classification thereof within the special employment contract category.

**Keywords:** employment contract; the professional foster carer; Labor Code of Romania; labor law.

**JEL Classification:** K31.

## 1. Conditions for concluding the employment contract

### 1.1. Conditions applicable to all contracts

#### *The employee's legal quality*

The legal capacity Government Decision (GD) no. 679/2003.

The employment contract may be validly concluded at the age of 16, and upon reaching the age of 15, with the approval of the parents or legal representatives, for activities appropriate for physical development, skills and knowledge, if such do not jeopardize their health, development and professional training.

The specialized doctrine<sup>4</sup> considers that one acquires the full capacity to conclude an employment contract at the age of 16. With regards to the age between 15 and 16, taking into account two regulations of a different nature, civil and labor,

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<sup>3</sup> Published in the Official Journal of Romania, Part I, no. 557 as of June 23, 2004.

<sup>4</sup> Ion Traian Ștefănescu, *Tratat teoretic și practic de drept al muncii (Theoretical and Practical Treaty on Labor Law)*, 4<sup>th</sup> edition, revised and supplemented, Universul Juridic Publishing House, Bucharest, 2017, p.252.

the legislator established the minor's capacity to conclude legal deeds in order to carry out an activity. Therefore, pursuant to Art. 41, para. 1 and para. 3 of the Civil Code, the minor has the capacity of limited exercise at the age 14, which allows them to conclude civil preservation deeds, administration deeds without prejudice to them, as well as low value acts of disposition on their own, that are current and are executed upon the signing thereof.

Pursuant to Art. 42, para. 1 of the Civil Code, the minor is entitled to conclude legal deeds concerning labor, artistic and sporting endeavors of any kind, or deeds concerning their profession, with the approval of the parents or guardian and subject to observing the special laws, if applicable, which may relate to civil or labor law. However, taking into account the provisions of art. 13, para. 2 of the Labor Code, a valid employment contract may be concluded at the age of 15, with the approval of the parents or the legal representative, because this deed implies carrying out a successive activity, and the obligation to perform must not jeopardize the teenager's physical and mental development.

The legal text includes a derogatory provision from the regime established therein, i.e. the minor may conclude legal deeds concerning labor unless the special legislation provides otherwise. With regards to the professional foster carer, art. 109, ind. 1 inserted after art. 109 of Law no. 272/2004 by Law no. 257/2013 amending and supplementing Law no. 272/2004 on the protection and promotion of the rights of the child<sup>5</sup> states that families and persons with the minimum age of 18 may receive children for foster care.

If the age of natural persons who can receive children for foster care is clear and implies no construction, the age requirements for families implies clarification, namely if all family members are required to be at least 18 years of age or if that requirement only applies to the persons assuming responsibility of foster caring for the child.

According to art. 4, let. a and let. b of Law no. 272/2004, child means a person who has not yet reached the age of 18, nor who has acquired the capacity of full exercise, pursuant to the law<sup>6</sup>, and the family comprises of parents and their children.

By corroborating the aforementioned texts, family means persons who are married and are at least 18 years of age or who have acquired the capacity of full exercise pursuant to art. 39, para. 1 of the Civil Code and have the capacity of parents. Such interpretation falls within the scope of the legislator by granting the certification, respectively concluding the individual employment contract, concerning the existence of moral guarantees and material conditions necessary for raising and caring for a child temporarily or definitively separated from their parents.

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<sup>5</sup> Published in the Official Journal of Romania, Part I, Part I, no. 607 as of September 30, 2013.

<sup>6</sup> According to Art. 39 of the Civil Code "the minor acquires, by marriage, the full capacity of exercise" and "if the marriage is invalidated, the minor who was of good faith when concluding the marriage, maintains the full capacity of exercise."

According to art. 1225, para. 1 of the Civil Code, the *scope* of the contract is the legal operation, and must be established legally under sanction of absolute invalidity, being considered illegal when it breaches the law or it infringes on public order or morality (art. 1225, para. 2 and para. 3 of the Civil Code).

The scope of the employment contract for the professional foster carer is, on the one hand, the provision by the latter of an activity with a generically outlined particularity, namely the appropriate fulfilment of obligations assumed by a parent, concerning the raising, caring and education of their children, and on the other hand, the remuneration of such activity by their employer.

The *cause of the contract*, legal condition for the validation thereof (art. 1235 of the Civil Code), is identical to the cause for granting the foster carer certification. Pursuant to art. 3, para. 2 of GD no. 679/2003, the applicant for the professional foster carer certification must specify in writing the reasons for wanting to become a professional foster carer. Therefore, the cause is the motivation that determines the assuming of the obligation, while the validity of the certification and of the contract shall be subject to the legal and moral nature of the cause (art. 1236, para. 1 of the Civil Code), the cause becoming illegal when impairing the law, public order or morality. (art. 1236, para. 2 and para. 3 of the Civil Code). The body authorized by special rules shall verify if the applicant's motivation observes the principle of the best interests of the child, to which all the legal provisions and any legal document issue or, if applicable, concluded in this field, pursuant to art. 2 para. (1) of Law no. 272/2004, are subordinate.

In order to verify the capability of the foster carer certification applicant by virtue of legal provisions, the latter must stipulate in writing the number of children for which they believe they are able to simultaneously provide optimum care conditions, the age group and sex thereof, the availability of caring for children with handicaps/disabilities, infected by HIV or suffering from AIDS.

### **1.2. Special conditions of the employment contract for the professional foster carer**

An essential condition for the conclusion of an employment contract is *the job vacancy within the budget sector*. In terms of concluding the employment contract of the professional foster carer, the Convention on the rights of the child, ratified by Law no. 18 /1990<sup>7</sup> stipulates under art. 20, para. 1 and para. 2 that "The child who is temporarily or permanently lacking their familial environment or whom, for the protection of their interest, may not be left in such environment, is entitled to special protection and care from the state," and "party states shall ensure alternative protection for such child, pursuant to their national laws." In this regard, according to art. 62, para. 1 of Law no. 272/2004, the national legislator has regulated child fostering as a temporary special protection measure, and that may be applied, pursuant to this law, as applicable, to a person or family, a foster carer

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<sup>7</sup> Republished in the Official Journal of Romania, Part I, Part I, no. 273/23.04.2002.

or a residential-type services. The internal legislation does not restrict the number of natural or legal persons facing a situation where child fostering is implied, the arguments being found in the provisions included in:

- the principle provided by art. 5, para. 1 of Law no. 272/2004 according to which “children are entitled to protection and care in the materialization and full exercise of their rights, pursuant to the law”

- the provisions of art. 3, para. 1 and of para. 3 of GD no. 679/2003 which establish the applicant’s obligation to mandatorily state the number of children for which they believe they are able to simultaneously provide optimum care conditions and the responsibility falling with the local community to which the child and their family are part of. The local public administration authorities must support the parents or, as applicable, another legal representative of the child in meeting the obligations arising with regards to the child, developing and ensuring for this purpose diversified, accessible, quality and comprehensive services for the child’s needs.

In choosing one of these solutions, one must appropriately consider the necessity of a certain continuity in educating the child, as well as their ethnic, religious, cultural and linguistic origins (art. 20, para. 3 of the Convention).

According to art. 1 of GD no. 679/2003, the professional foster carer is a natural person, certified under this normative act, who ensures by the activity carried out at their domicile the raising, care and education necessary for the harmonious development of the children received for fostering or custody.

The legal definitions specifies the features of the capacity of professional foster carer, namely:

- a) the institution of “foster carer” is regulated by art. 62, para. 1, let. b of Law no. 272/2004, while the attribute of “professional” is added by art.1 of GD no. 679/2003 “which does not represent a derogatory regulation which implies that the legal solutions concerning a specially determined situation include different norms compared to the framework-regulation in the field, with the latter maintaining its general mandatory nature for all other cases<sup>8</sup>, but rather represents a breach of the constitutional principle provided by art. 108 para. (2) of the Constitution, according to which the Government adopts decisions, which are issued for the organization of law enforcement, while the Parliament is the sole legislative power.
- b) Moreover, according to COR, code 531201 stipulates the profession of “Foster carer,” and under no circumstances “professional foster carer.” Via the entirety of norms outlining the status of foster carer, the legislator particularizes the very professional nature of the foster carer, thus the addition of such attribute was not necessary.

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<sup>8</sup> Art. 15, para. 3 of Law no. 24/2000 on the norms of legislative technique for the issuance of normative acts, republished in the Official Journal of Romania, Part I, Part I, no. 182/15.03.2011.

- c) Persons who want to obtain the certification of foster carers must meet the legal requirements granting special characteristics to the legal employment.
- d) The activity is carried out at the domicile of the foster carer.
- e) The raising, care and education fall under the achievement of the scope for granting the certification, namely the harmonious development of children.
- f) The means for achieving the scope of granting the certification are the fostering or custody of the children to the foster carer.

Within the procedure for obtaining the certification of professional foster carer, the body authorized<sup>9</sup> to grant this certificate verifies the fulfilment of legal requirements for acquiring thereof. The certification is related to compliance<sup>10</sup>, the lack thereof prohibits the conclusion of the employment contract by an applicant, because the latter does not feature the training recognized by the legislator in order to conclude such a specific deed.

Considering that a first requirement was assessed, namely the one regarding the capacity of exercise, we shall hereafter focus on the other requirements characterizing this employment contract category.

In order to be certified as professional foster carers, persons must provide guarantees for the correct fulfilment of obligations incumbent on a *parent*, concerning the raising, care and education of their children by their social behavior, health<sup>11</sup> and psychological profile (art. 2, para. 1, let. b). The doctrine<sup>12</sup> stated that art. 28 of the Labor Code implies the obligation to undergo a medical examination both during hiring, as well as subsequently, throughout the performance of the employment contract, in cases expressly provided by the text. We believe that the medical examination must be carried out on a regular basis throughout the performance of the employment contract of the professional foster carer, even in the absence of an imperative text, because the health thereof represented a mandatory condition for granting the certification.

The social behavior and the psychological profile of the applicant are proven by the submission of the criminal record certificates of such applicant and of the persons they live with (art. 3, para. 3, let. d) and also the assessment thereof by interviewing the applicant and the persons they live with by a social worker and

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<sup>9</sup> According to art. 3, para. 1 of GD no. 679/2003 the request for assessing the applicant's capacity is analyzed by a public service specialized in child protection from within the county, respectively the district of the Municipality of Bucharest, where their domicile is located or where a private authorized body carries out child protection activities.

<sup>10</sup> Monica Gheorghe, *Dreptul individual al muncii. Curs universitar (Individual Labor Law. University Course)*, Universul Juridic Publishing House, Bucharest, p. 101.

<sup>11</sup> Art. 3, para. 3, let. c of GD no. 679/2003 "Medical certificates issued by the polyclinic where they are registered shall be submitted, providing a full assessment of the health of the applicant and of the persons the applicant lives with."

<sup>12</sup> Lavinia Onica Chipea, *Dreptul muncii, Curs universitar (Individual Labor Law. University Course)*, 2<sup>nd</sup> Edition, revised and supplemented, Pro Universitaria Publishing House, Bucharest, 2017, p. 65.

by a psychologist, so as to determine the applicant's psychological profile, their motivation for becoming a professional foster carer and the position of the persons they live with concerning the implications of carrying out this activity, as well as by recommendations made by the applicant's neighbors, acquaintances, relatives, and by the representatives of the local public authorities at the domicile thereof with regards to the social behavior of the applicant (art. 4, para. 2, let. a and let. c of GD no. 679/2003).

Certification applicants must provide a document whose content must demonstrate the use of a household meeting the requirements for preparing food, hygiene, education and rest of its users, including those of children to be received for fostering or custody (art. 2, para. 1, let. c)

The "professional" capacity of the foster carer is determined by the professional training, therefore, applicants must provide proof of attending the professional training courses organized by the public service specialized in child protection or by the authorized private body providing assessments for granting the certificate of professional foster carer<sup>13</sup>.

The requirements established by art. 2, para. 2 of GD no. 679/2003 The requirements established by art. 2, para. 2 of GD no. 679/2003 which prohibit the granting of a foster carer certificate represent genuine prohibitions that highlight a special justification, because the moral profile of the applicants represents a guarantee for meeting the fostering or custody measure in the best interests of the child, principle acquiring its efficiency by observing the norm established in the aforementioned text. The moral profile of the applicant is also verified by the legal obligation thereof to taking it upon themselves to declare <sup>14</sup> that they are not subject to any of the situations provided by art. 2 para. (2) let. b of GD no. 679/2003, respectively:

a) has not been convicted by final court decision, for intentionally committing an offense;

b) being a parent, is not deprived of their parenting rights or that of a child declared abandoned by a final court decision;

c) does not suffer from chronic transmittable diseases.

The prohibitions established by the legislator along with the lack of capacity to conclude an employment contract<sup>15</sup> as well as the persons who have been subject to a restriction of legal capacity due to mental alienation or infirmity (even if such are over 16 years of age) complete the register of protection for children subject to foster or custody, objectively monitored by the legislator via the special provisions adopted.

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<sup>13</sup> Art. 2, para. 1, let. d of GD no. 679/2003.

<sup>14</sup> Art. 3, para. 3 let. f of GD no. 679/2003.

<sup>15</sup> Minors of up to 15 years of age according to art.49, para. 4 of the Constitution and art.13, para. 3 of the Labor Code.

## 2. Information obligation

The specific aspect of the information obligation provided by art. 17, para. 3 of the Labor Code for the foster carer arises from the procedure for granting the professional foster carer certificate, action occurred prior to the conclusion of the employment contract, which confirms the meeting of certain mandatory legal requirements within the information obligation and the content of the contract.

We believe that although a great part of the essential elements of the employment have been verified by the bodies authorized by GD no. 679/2003<sup>16</sup> such as the medical examination<sup>17</sup>, the verification of training and professional skills<sup>18</sup>, and that have consolidated the granting of the certificate, the stage of informing the employee by the employer, prior to the conclusion of the employment contract, is mandatory for at least the following normative considerations:

- Art. 2, para. 1 of Directive 91/533/EEC<sup>19</sup> regulates the employer's obligation to inform the employee on the essential elements of the contract or employment.

Although the doctrine stated that from an evidence perspective, the pre-contract negotiation stage does not imply the employer's obligation to prove, via a document, what the law already presumes in their favor<sup>20</sup>, we believe that with regards to the conclusion of the employment contract for the professional foster carer, the information obligation must be formalized within a deed (document) due to the special character of employment that requires the employee to be familiar with both the legal rights and obligations, as well as with the responsibilities for the training and physical and mental development of the child.

- Art. 17 of the Labor Code imperatively establishes the employer's obligation to notify the person selected<sup>21</sup>, the legislator does not make distinctions between contracts, on the one hand, and on the other hand, Law no. 272/2004 does not eliminate the provisions of the Labor Code via any special regulations.

- the presence of the other essential elements of the employment contract, which have a special connotation within the context of a special employment determined by the child's best interests.

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<sup>16</sup> The position/occupation according to the specification of the Romanian Classification of Occupations.

<sup>17</sup> Art. 3, para. 3, let. c of GD no. 679/2003 "Medical certificates issued by the polyclinic where they are registered shall be submitted, providing a full assessment of the health of the applicant and of the persons the applicant lives with".

<sup>18</sup> Art. 3, para. 3, let. a of HD no. 679/2003 "The following shall be attached to the assessment request: a) notarized copies of the marital status documents and graduation record of the applicant: the applicant's graduation documents

<sup>19</sup> <http://eur-lex.europa.eu/legal-content/RO/TXT/?uri=celex%3A31991L0533>

<sup>20</sup> Felicia Roșior, *Dreptul individual al muncii. Curs universitar (Individual Labor Law. University Course)*, Universul juridic Publishing House, Bucharest, p.310.

<sup>21</sup> Has the meaning of holding a certificate according to the provisions of GD no. 679/2003.

The criteria for assessing the professional activity of the professional foster carer, the specific risks of their activity, the duration and application of the annual leave, overtime, etc. represent only a few elements of significant interest within the information obligation of which the professional foster carer – employee must be notified in order to express their consent for the responsible conclusion of the employment contract, in terms of the particularity thereof.

Within the information obligation we have identified a category of elements specific to the employment of the professional foster carer of which the latter must be informed.

We hereby provide examples:

- the express statement that the employee must work from their domicile<sup>22</sup> (art. 109 of the Labor Code).

- the right of the body authorized by the legislator to perform inspections at the foster carer's domicile in order to verify the manner in which the latter fulfills their obligations and responsibilities assumed towards the child or children received for fostering.

- the conclusion of the employment contract for the professional foster carer is subject to the termination of the employment contract underlying their remunerated activity until such date<sup>23</sup>, the situation of concurrent employment contracts being prohibited.

- the duration of the employment contract is determined by certificate validity.

- the termination of the employment contract is determined by the expiry or by the withdrawal of the certificate.

- the conclusion of an addendum to the employment contract concluded with the employer for each child received for foster or custody.

Taking into account the special particularities of the employment contract for the professional foster carer, we believe that in order to ensure the employer's conviction that the employee understands the mission implied by the employment contract, it is advisable to formalize the obligation to inform the employee in writing.

### Bibliography

1. Felicia Roșior, *Dreptul individual al muncii. Curs universitar (Individual Labor Law. University Course)*, Universul juridic Publishing House, Bucharest,
2. Ion Traian Ștefănescu, *Tratat teoretic și practic de drept al muncii (Theoretical and Practical Treaty on Labor Law)*, 4<sup>th</sup> edition, revised and supplemented, Universul Juridic Publishing House, Bucharest, 2017,
3. Lavinia Onica Chișea, *Dreptul muncii, Curs universitar (Individual Labor Law. University Course)*, 2<sup>nd</sup> Edition, revised and supplemented, Pro Universitaria Publishing House, Bucharest, 2017,
4. Monica Gheorghe, *Dreptul individual al muncii. Curs universitar (Individual Labor Law. University Course)*, Universul Juridic Publishing House, Bucharest, 2015,
5. Septimiu Panainte, *Dreptul individual al muncii*, Ed. Hamangiu, Bucharest, 2017.

<sup>22</sup> Septimiu Panainte, *Dreptul individual al muncii*, Ed. Hamangiu, Bucharest, 2017, p.61.

<sup>23</sup> Art.2, para. 3 din H.G.nr.679/2003.