Aspects of posting (from the perspective of the salary state and the public servant). Proposals *de lege ferenda*

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Abstract

If the contracting parties resort to the conclusion of individual labor contracts/individual administrative contracts[2]*, the adaptation of gainful activity to technological or economic developments may require the modification of those legal acts on the basis of which the activity is carried out – also in view of the intrinsic dynamics of the work / service*[3]*. The "pacta sunt servanda" principle is also applicable in the scope of the contracts noted above. Its application implies that, as far as possible, the parties understand to maintain, throughout the execution of the contract, the clauses initially foreseen. Obviously, however, that a valid contract can not remain "frozen" if, in the meantime, new elements or requirements arise during its execution.*

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1. Introductory issues

A). Modification of the individual labor contract/individual administrative contract involves a change in the merits (the place of work, the type of work, the salary, etc.) and not just an interruption of the execution of the respective contract[4].

However, the mechanism of changing the legal relationships of employment/legal relationships of service must not bring about any deterioration of the rights of employees/public servants; in the case of employees, we are talking about mandatory provisions of the law that exclude any transaction, renunciation or limitation in relation to the rights recognized by law (according to article 38 of the Labor Code).

B). a). During the execution of the individual labor contract, the amendment regarding any of its clauses[5] is usually done by agreement of the parties and an additional act is concluded in this respect.

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[2] To be seen Ion Traian Ştefănescu, *Tratat teoretic şi practic de drept al muncii*, fourth edition, revised and added, Universul Juridic Publishing House, Bucharest, 2017, p. 24; Alexandru Ţiclea, *Tratat de dreptului muncii, Legislaţie. Doctrină. Jurisprudenţă*, Xth ed., updated, Universul Juridic Publishing House, Bucharest, 2016, p. 28.

[3] Ion Traian Ştefănescu, *op. cit*., p. 22-28.

[4] In a way, the suspension of the individual employment contract is a change, but not the contract itself, but its execution as a normal way of its existence (through execution).

[5] To be seen Ion Traian Ştefănescu, *op. cit.,* p. 412-413.

However, the modification of the individual labor contract can also be achieved by certain contractual clauses[6] – which exist ab initio in the content of the respective contract.

Modification of the individual labor contract by agreement implies a negotiation similar to that concluded upon its conclusion. Thus, the employee's tacit acceptance of the modification of the individual employment contract is excluded, the law establishing the requirement for an additional act.

Prior to the modification of the individual employment contract, the employer has the obligation to inform the employee about the essential clauses he intends to modify (according to article 17 paragraph 1 of the Labor Code).

Under the terms of the Labor Code – which regulates a set of types of individual labor contracts (indefinite or fixed, full-time or part-time, etc.), the legal institution of the change operates regardless of the type of contract concluded – including when changing from one type of contract to another (article 86 of the Labor Code and article 107 of the Labor Code respectively apply).

The employer may legally, unilaterally, modify the place and/or type of work[7] in the following cases: delegation (but only in the first period); posting (but only for the first period); in cases of force majeure which, even if not expressly provided for in the Labor Code, would have produced such an effect under the general rules; as a disciplinary sanction; as a protection measure for the employee (according to a rticle 48 of the Labor Code).

b). Mobility within the public servants' body is achieved by changing the service relations: for the efficiency of the public authorities/institutions; in the interest of the public servant – for the career development in the public office.

Modification of the service relations of public servants and senior public servants shall take place by[8]: delegation; posting; transfer; moving within the public authority/institution or within another structure without legal personality of the public authority/institution; the temporary exercise of a public management function (article 87 paragraph 2 of Law No. 188/1999 on the Civil Servants' Statute[9]).

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[6] Such a clause is the indexation – the legal effect of which is the periodic increase of the salary with at least the inflation index.

[7] Moreover, in the judicial practice preceding the 2003 Labor Code, it was in principle considered that the modification of the individual labor contract at the initiative of the unit, which is subject to restrictive legal regulations, does not contradict the contractual character of the employment legal relationship. See, in this respect, the Târgu-Mureş Court of Appeal, civ., dec. no. 610 / R of 26 August 1999.

[8] See about how to modify public servants' service relations Cătălin-Silviu Săraru, *Drept administrativ. Probleme fundamentale ale dreptului public*, C.H. Beck Publishing House, Bucharest, 2016, p. 408-411.

[9] Republished in the "Official Gazette", Part I, no. 365 of May, 2007.

2. Aspects regarding the posting of employees/public servants

As I have pointed out, as an exception to the rule of modification of the individual labor contract by agreement of the parties, such amendment is possible and unilaterally – by the act of the employer in the situations regulated by the law.

A). Posting[10] of employees consists of the temporary change of the job, at the employer's disposal, to another employer for the purpose of carrying out works in its interest (articles 45-47 of the Labor Code).

The item of the individual employment contract modified by posting is the place of work. Exceptionally, by posting, the type of work may change, but only with the written consent of the employee (article 45 of the Labor Code).

As a temporary and partial assignment of the individual labor contract between two units, the posting implies a convention in the sense that the unit where the employee is covered by an employment contract accepts to be temporarily replaced by another unit for the purpose of fulfilling it the end of their own tasks.

Posting is a temporary measure that can be disposed for a period of up to one year, its prolongation being possible from 6 months to 6 months, but only for objective reasons requiring the employee to be posted to the seconded employer and only with the agreement of both parties.

Only for the first period of up to one year is a mandatory unilateral measure that the employee must execute on the basis of the prior consent given at the conclusion of the employment contract; subsequently, for an extension, its consent is binding.

B). In the case of public servants, posting shall be ordered in the interest of the public authority or institution in which the public servant is to be employed for a period not exceeding 6 months. In the course of a calendar year, a public servant may be posted for more than six months only with his consent (under article 89 paragraph 1 of Law No. 188/1999) which, unlike the situation of the employees, must be written.

Posting may be ordered if the public servant's professional training corresponds to the duties and responsibilities of the public service, respecting the category, grade and professional status of the civil servant (not regulated in the case of employees). Posting may be ordered on a public management position if the public servant fulfills the conditions of study and seniority in the studies and if there are no public servants in the public authority/institution that temporarily exercise the public office. A public servant may be posted to a lower public office only with his written consent (article 89 paragraph 2 of Law No. 188/1999).

Exceptionally, posting may also be performed on a public position in the category of high public servants if the public servant fulfills the conditions for studies and seniority in the studies necessary for the performance of the public service. In this case, the posting shall be ordered by administrative act of the person who has the legal competence to appoint public servants who hold public positions

[10] The posting measure was first regulated by the 1950 Labor Code.

in the category of senior public servants, at the proposal of the head of the public authority/institution in which the posted public servant is to carry out his activity (article 89 paragraph 2^1 of Law No. 188/1999).

Public servants with special status may be posted on general public positions equivalent to the specific public positions occupied, with the approval of the National Agency of Civil Servants (article 89 paragraph 2^2 of Law No. 188/1999).

Public servants may also be deployed on public positions with special status, with the approval of the National Agency of Civil Servants (article 89 paragraph 2^3 of Law No. 188/1999).

B). The effects of posting. a). Posting is followed by the temporary assignment of the employee to another employer, subordinating him/her. The employee will respond disciplinaryly to the employer to whom he is seconded.

However, without the existence of explicit legal texts, in the legal doctrine[11], it should be considered that the measure of disciplinary dismissal of the employee can be taken only by the unit that sent him/her – which must also agree with the disciplinary sanction of relegation from office, sanction which radically affects the status of the respective employee.

The posted worker may refuse to postpone the secondment made by his employer only exceptionally and for grave personal reasons. Thus, the employee's deed of unjustified refusal to be posted constitutes disciplinary offense and is sanctioned as such.

b). During the period of posting, the public servant retains his public office and salary (article 89 paragraph 4 of Law No.188/1999).

A public servant may refuse to be posted if he is in one of the situations (expressly and restrictively regulated by article 89 paragraph 3 of Law No. 188/1999).

3. Conclusions

The following conclusions can be drawn from setting up the applicable legal regime in the area covered:

A). If, in the Labor Code of 1973, the legal institutions of delegation and posting were regulated in the same texts (articles 66-68), leaving the impression at first sight that the only difference between them would be their maximum different duration (60 days and 6 months respectively), the present regulation expressly provides that the posting is ordered for the purpose of carrying out works in the interest of the employer to whom the posting is carried out. *A contrario*, in the case of delegation, it is not foreseen that work is done in the interest of the employer to whom the measure is ordered – the work being done exclusively in the interests of the employer who took the measure of delegation.

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[11] To be seen Ion Traian Ştefănescu, *op. cit.,* p. 417; Raluca Dimitriu, *Dreptul muncii. Anxietăţi ale prezentului*, Rentrop&Straton Publishing House, Bucharest, 2016, p. 75.

B). Unlike the previous Labor Code (article 66 (3)) which regulates the maximum period of secondment of 2 years, the current regulation (article 46 (2) of the Labor Code) no longer provides for such a maximum duration (taking into account the fact that the extension of the posting is done with the employee's agreement).

C). As can be seen from the above, the current legal regulation is more rigorous and more favorable to the one who performs the work, given the fact that under the Labor Code the detachment has always been unilateral, being compulsory for the employee.

D). Compared to the old Labor Code, the new legal regulation provides for a number of protection measures – which determines that the posting measure is regulated at a higher level from the employee's point of view: during the posting, the employee benefits from the more favorable rights, or from the employer who posted the posting, or from the employer to whom he is seconded (article 47 paragraph 2); if the employer to whom the posting is posted does not fully and timely fulfill all obligations with respect to the seconded person, they will be fulfilled legally by the employer who posted the posting; However, if there is a discrepancy between the employers or none of them fulfills their obligations, the secondment has the right to return to his/her place of work, to bring proceedings against either employer and to request forced execution of unfulfilled obligations.

E). If the salary corresponding to the civil service on which he is seconded is higher, the public servant is entitled to this salary (article 89 paragraph 4 of Law No. 188/1999).

F). During the posting to another locality, the beneficiary public authority/institution is obliged to bear the full cost of transport, returned and returned, at least once a month, to accommodation and secondment allowance (article 89 paragraph 4 of the Law No. 188/1999).

4. Proposal *de lege ferenda*

In conclusion, it should be noted that from the point of view of the above rules, *de lege ferenda* we consider that it would be useful to regulate labor law legislation in certain respects, as follows:

a). In order to avoid possible abuses, the express provision in the Labor Code for the maximum duration of the measure of posting – based on the provisions of the Labor Code – 2 years would be justified.

At present, for the extension of the secondment, for objective reasons, from 6 to 6 months, the employee's consent is required (article 46 paragraph 2 of the Labor Code).

However, it may be difficult to prove that the employee has been compelled to agree to such a measure – which is why the regulation of the maximum duration of secondment would remove the possible difficulties.

b). In the current legislative framework, the Labor Code, which does not regulate what is meant by the phrase "*exceptionally and for good personal*

reasons", shall apply, by analogy[12], the reasons provided for public servants under art. 89 par. 3 of the Law No. 188/1999 on the Statute of public servants. Transposed into the individual work contract, these reasons are: pregnancy; the fact that the employee himself grows a minor child; health status, proven by medical certificate; the situation in which the employee is the sole family carer; well-founded family reasons – other than previous ones; where the posting would take place in a locality where the appropriate accommodation conditions are not ensured to the employee.

Similar to the case of delegation, and in the case of the legal institution of posting, the use of analogy is possible because another legal solution, in fact, does not exist[13].

Thus, given the fact that in certain categories of employment[14] the cases in which the posting may be refused are expressly regulated, it is also necessary to specify in the Labor Code express and limitative the situations in which the employees may refuse to change the contract – through this legal institution individual work. Thus, the cases in which the posting could be refused would be the ones mentioned above.

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6. Labor Code, republished in the Official Gazette, Part I no. 345 of May 18, 2011, as amended.

[12] Ion Traian Ştefănescu, *op. cit.,* p. 418.
[13] *Ibidem.*
[14] As is the case, for example, of public servants.