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ORIGINAL PAPER

Implications of modifying individual employment contracts in the light of current Romanian legal provisions

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Abstract:
Due to the dynamism and complexity of employment relationships, in the current context we are witnessing different situations, circumstances or new elements that may lead to the modification of the contractual clauses included in the individual employment contracts. The current labor legislation is quite permissive, which implies little to no restrictions regarding the mutual or unilateral modification of the individual employment contract with strict observance of the cases required by law. All these changes allowed by labor legislation are generated by certain socio-economic needs, better work organization and, last but not least, the evolution of society that is always changing and innovating. The legal institutions through which a unilateral modification of the individual employment contract can be made under legal conditions are delegation and secondment, which have substantial features that can generate special confusions in practice.
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1. Introductory aspects

Along with other basic principles, the principle of job stability is the one which concerns the performance of the contract, which implies that the latter´s modification and termination may occur in cases clearly set out by the legislator. The principle indicated above is a principle that governs labor relations in domestic law, while the principle that occupies a central place in international labor law is that of the sovereignty of states (Popescu, 2008a: 107-108). All these essential principles that concern both domestic law, but especially international labor law, have the role of guiding the whole issues concerning labor relations, which are in constant change due to the dynamism and complexity imposed by human relations in today's society.

The fundamental principles of international law have often inspired national laws that have taken over many principles such as the principle of freedom of labor, collective bargaining, freedom of association, fair pay, professional development, occupational safety, security and health at work (Popescu, 2008b:133).

The rules regarding the modification of the individual employment contract are presented in the Romanian labor legislation, more precisely article 41 of the Labor Code, which provides in par. 1 that ,,the individual employment contract can be modified only by agreement of the parties". The same article from the normative act indicated above, but at par. 2, stipulates that, ,,as an exception, unilateral modification of the individual employment contract is possible only in the cases and under the conditions presented in the code. "

Modification of the individual employment contract referred to in art. 41 para. 3 of the Romanian Labor Code, may refer to any of the following elements that represent in fact, essential clauses of the contract: duration of the contract, place of work, type of work, working conditions, salary, working time and rest time (Popescu, 2011:86).

In the specialized literature (Țop, 2018:301) it was circulated that the inadmissibility of the unilateral modification of the employment contract does not include non-essential elements, but only its essential, significant elements, namely the type of work, as determined by both professional qualification and function or profession entrusted, the place of work, which means the unit or locality, as well as the salary.

However, art. 48 of the Romanian Labor Code stipulates that the employer may temporarily change the place and type of work, without the consent of the employee, in case of force majeure, as a disciplinary sanction or as a measure to protect the employee.

At the same time, it was shown that ,,unilateral changes to the exact conditions of work are allowed ... only to the extent that they do not attract a substantial change (alteration) to the relationship between the parties."

Given that the unilateral modification of the individual employment contract is in principle prohibited, the only institutions through which this change can be made without bringing the slightest violation of the legal provisions in force are that of delegation and secondment of the employee. Through the two institutions, the amendment of the individual employment contract is a temporary, but not final one, and currently, the current labor legislation does not contain legal provisions resulting from any permanent institution that can unilaterally amend the individual employment contract.

The doctrine mentions a case of ,,definitive modification of the individual employment contract is the promotion, i.e. the permanent transfer of the employee to

another position superior to the one previously held, the essence of which is the change of work" (Țiclea, 2009:664).

The current labor codification does not contain legal provisions regarding the institution of the transfer as a way of modifying the individual employment contract that materializes through the final transfer from one unit to another of the employed person (Voiculescu, 2007:59).

The absence of legal provisions regarding the institution of the transfer was considered a legislative gap, given the importance of the transfer, as having been proved in many situations, as well as the fact that it is provided by special laws for several professional categories (teaching staff, doctors, magistrates, customs staff, civil servants, police officers) (Țiclea, 2005:296).

It was mentioned that „the institution of transfer can be used only if the special legislation expressly provides for such a modification of the individual employment contract, in other cases, the contract terminates by agreement between the employer and the employee, followed by the conclusion of a new employment contract between employee and new employer" (Țop, 2018:302).

Often, in practice, confusions have been created regarding the modification of the contract by altering the job description and in this sense in the literature (Țiclea, 2016:686) it was noted that changing the job by modifying the job description does not constitute a change of contract unless the nature of the work performed changes.

The factors that generate the change of the individual employment contracts are related to the better organization of work, to certain socio-economic needs, but also to some personal interests of the employees, and this change implies the transfer of the employee to another job or another activity temporarily or even permanently (Țiclea, 2016:683).

It should be noted that an individual employment contract is not a civil contract, but still a contract with all the specific features that fall within the scope of private law contracts. The characteristic features of the individual employment contract are clear, this being: a bilateral legal act, synallagmatic, onerous and commutative, consensual, intuitu personae and, last but not least, with successive execution act.

In the French legal literature, the individual employment contract is considered that contract by which a natural person (employee) undertakes to perform a job subordinated to a natural or legal person (employer) in exchange for remuneration (Auzero & Dockés, 2015:227).

For a better legal protection, the written form of such contracts is requested ad validitatem, and in accordance with the provisions of art. 1243 of the Romanian Civil Code, „if the law does not provide for this, any modification of the contract is subject to the formal conditions required by law at its conclusion." Thus, in the case of the individual employment contract, any change must be drafted in writing regardless of whether it is a bilateral or unilateral act of the employer.

The legal levers through which the employer can unilaterally change the workplace without the consent of the employee are: unilateral change of workplace as a result of delegation, unilateral change of workplace by secondment and unilateral change of workplace by temporary transfer to another job.

All these legal levers are the prerogative of the current codification which makes clear references to them, making them available to the employer who can use these institutions in good faith and in strict compliance with the legal provisions in force.

2. Effects and specificity of the institution of delegation

In the light of the legal provisions, in this case art. 43 of the Romanian Labor Code, it is stated that the institution of delegation is the temporary exercise, at the employer's disposal, by the employee, of works or tasks corresponding to duties outside his place of work.

Instead, in the literature it was noted that the delegation ,,presupposes the existence of a prior agreement between the employer and the unit to which the employee is sent ... an agreement that is not necessary if the unit to which the delegation is to be made is required by law to admit the presence of the delegated employee, or when it takes place in a subunit or own work formation" (Țiclea, 2014:667).

Delegation, as well as secondment, are tools that the legislator has created and made available to the employer for temporary use and in cases clearly provided by applicable law, specifying that the employee retains his position and all other rights provided in the individual work contract.

Nor should it be neglected that ,,judicial practice has correctly ruled that delegation as well as other acts ordered by the employer in the execution of individual employment contracts may also have a collective character ... a single decision to delegate several employees, but specified individually" (Ștefănescu, 2017:414).

In practice, there have been situations that can create confusion such as the circumstances in which the employer uses a decision to appoint vacant management positions, until they are filled by examination or competition, with a replacing employee, when the specialized literature stressed out that we are not in the presence of the delegation institution (Țiclea, 2016:688).

It was emphasized that ,,it is essential for the delegation that the place where it is performed is not the usual place of work" (Țiclea, 2012:667).

The institution of delegation does not produce many changes to the individual employment contract, so the only change involves a change of job, and other elements such as the length of working time cannot be changed by the effect of the delegation.

All rights of the employee arising from an individual employment contract concluded under the law must be strictly respected by the employer even during the delegation. Any abuse or bad faith violation of the legal provisions by the employer entails the rigors of the law.

The legislator regulated the temporary limits within which the delegation institution acts and according to the provisions of the labor code it is specified in art. 44 of the Romanian Labor Code the fact that this measure can be ordered for a period of maximum 60 calendar days in 12 months and can be extended for successive periods of maximum 60 calendar days, only with the consent of the employee.

In accordance with the provisions of art. 44 paragraph 2 of the Romanian Labor Code, the disciplinary sanctioning of the employee cannot intervene in the situation in which he refuses to extend the delegation measure.

As the disciplinary sanction cannot intervene as a result of the employee's refusal to extend the delegation, in the specialized literature was circulated the idea according to which ,,there are applicable by analogy the conditions imposed by art. 46 para. 3 in the case of secondment, namely that the refusal is only able to intervene only exceptionally and for good personal reasons" (Țiclea, 2014:666).

The current labor legislation is very clear regarding the period of time for which the delegation measure is instituted without appealing to the employee's consent, this

being of a maximum of 60 days, and the disposition of the delegation for a period longer than 60 days implicitly involves obtaining of the employee's consent (Moțiu, 2011:183).

If the employee cannot oppose the measure establishing the delegation, the measure being mandatory, being implemented by the need to carry out the employer's activity in good conditions, instead in the case the employer wishes to extend the measure beyond the legal term of 60 days, we are no more in the presence of a discretionary right and it must necessarily be appealed to the consent of the employee.

Exceptionally, there are also situations in which the consent of the employee is obligatorily required for both periods provided for the establishment of the delegation measure, respectively in the case of the magistrates, as art. 57 para. 3 and 6 of Law no. 303/2004 on the status of judges and prosecutors clearly requires the agreement for both periods, both for the first period of no more than 90 days in a year, but also for the extension of the first period by no more than 90 days. In this case, it is mandatory to obtain the consent of the judge, precisely in order not to violate the fundamental principle, that of the immovability of magistrates. Therefore, in a state governed by the rule of law and democracy, the immovability of judges is one of the basic pillars of the organization of justice. It should be emphasized that the fundamental law of the Romanian state refers in its content to the immovability of judges in the content of art. 125 par. 1 „the judges appointed by the President of Romania are irremovable, in accordance with the law. ”

The legal literature has provided practitioners with the method of calculating the 60 calendar day period that applies to the delegation institution and thus „the number of 60 calendar days is calculated from the calendar date on which the delegation measure is ordered, which again is calculated in proportion to the number of months remaining until the end of the calendar year, and the following year, the employer will have the first period of delegation in full. It is sufficient that, in relation to the calendar year, the employer to order the measure of delegation in compliance with the period of 60 calendar days, even if they do not flow consecutively, one after the other” (Top, 2018:304-305).

The institution of delegation does not only presuppose a link between the employer and the employee; it also implies the unit to which the employee is sent. Thus, a prior agreement is reached between the employer who sends the employee and the unit to which he is to carry out his activity, which contains provisions regarding the performance of work at the place of delegation, as well as the manner of its termination.

During the period in which the delegation measure acts, the employee falls under the legal employment relationship with the employer who delegated it, subordinating himself only to him, not to the unit to which he performs the delegation. At the same time, the employee retains his / her position, degree or professional level and the previous salary, and the disciplinary sanctions can be applied to the employee only by the unit that delegated him / her.

In accordance with Art. 44 para. 2 of the Romanian Labor Code, the delegated person has the right to the payment of transport and accommodation expenses, as well as to a delegation allowance.

At the same time, there must also be outlined the provisions of art. 55 letter a of the Government Decision no. 518/1995 according to which the Romanian personnel sent abroad for the accomplishment of some temporary missions receive, during the delegation and secondment, a delegation allowance composed of a daily amount, hereinafter referred to as daily allowance, in order to cover the food and other usual

small expenses, as well as the cost of transport within the locality in which it operates and, at the same time, a daily amount, hereinafter referred to as accommodation allowance, within which the staff must cover their accommodation expenses. Accommodation expenses mean, in addition to the rates or rent paid, any local taxes, as well as the cost of breakfast, when included in the rate.

It was of interest to practitioners whether the employee has the legal possibility to appeal to the court, and the literature came to their aid and stated that ,,only in terms of the legality of the measure, the opportunity to delegate cannot be censored, as it is an attribute of the employer, for a good organization of work" (Gheorghe, 2015:188).

In the event that the employee has caused damage to the unit to which he has been delegated, the patrimonial liability cannot be directly established, but the unit that has been harmed will have the legal possibility to go against the one who delegated the employee with an action in damages for the full or partial coverage of his damage, and in his turn the unit that ordered the measure of delegation will regress against its own employee, according to art. 253 of the Labor Code (Ștefănescu, 2017:416).

In the literature it was noted that ,,if there is no contractual relationship, the unit damaged by the employee will be able, according to tortious civil liability, to seek compensation in court, either from the employer (as principal) who ordered the delegation, either from the delegated employee, or in solidarity from both" (Popescu, 2011:87).

It was also noted that in both cases the damage must have been caused by the employee in the performance of duties or in connection with them, otherwise his liability will be incurred exclusively on the basis of civil law (Top, 2018:306).

Considering the fact that the current codification does not distinguish between the delegation on the Romanian territory or abroad, the institution of the delegation can be constituted for the same period, with the possibility of extension from 60 to 60 days with the employee's consent. In this situation, too, the employee's refusal to extend the delegation cannot entail the application of disciplinary sanctions.

The delegation shall cease in the following cases: at the expiry of the period until which it was ordered, after the execution of the works or the performance of the tasks which were the subject of the delegation, by revoking the measure by the employer, by termination of the employment contract by the delegated person (Țiclea, 2016:690).

3. Effects and specificity of the secondment institution

Pursuant to art. 45 of the Romanian Labor Code, secondment is the act which provides for the temporary change of job at the disposal of the employer, to another employer, in order to perform work in his interest.

According to the provisions of art. 88-100 of the Labor Code, a secondment, but with a special character, can also be considered work through a temporary work agent.

The doctrine noted that ,,the secondment is not arranged within the same unit, from one subunit to another, or from one post to another, but in order to take this measure it is necessary to have an express request from a unit other than the one in which the employee is working" (Țiclea, 2016:691).

At the same time, from the aspect of the legal nature, ,,secondment can be seen as a partial and temporary assignment of the individual employment contract, accompanied by the retrocession clause" (Panainte, 2017:124).

The Romanian labor legislation specifies in art. 46 the fact that the institution of secondment may be ordered for a period not exceeding one year, and only exceptionally, the period of secondment may be extended for objective reasons requiring the presence of the employee at the employer at which the secondment was ordered, with the agreement of both parties, by successive periods of 6 months. Given that the measure of secondment is materialized in a mandatory provision for the employee, any unfounded refusal by him to implement this instrument may entail the application of disciplinary sanctions, including the most severe of these, consisting in the termination of the employment contract.

It should be emphasized that the labor legislation does not indicate in its articles what would be the solid personal reasons for which the employee can refuse his secondment to another employer, instead Law no. 188/1999 on the status of civil servants provides in art. 89 paragraph 3 which are the solid personal reasons, these being the state of pregnancy, the circumstance of the employees raising their minor children alone, the precarious state of health proven with a medical certificate, the situation in which the secondment takes place in another locality accommodation, the situation in which the employee is the sole breadwinner and, last but not least, good family reasons. Thus, the High Court of Cassation and Justice, the administrative and fiscal contentious section, by decision no. 1135/2012 ruled that the advanced age of the parents in the care of the employee, justifies the refusal of the civil servant to comply with the measure, the secondment order being illegal, adopted with excess of power.

It was also noted by the legal literature that ,,an individual employment contract being executed simultaneously with the one for which the secondment is ordered is a good personal reason for the employee to refuse the secondment in another locality" (Popescu, 2017:68).

In accordance with the provisions of art. 46 para. 4 of the Labor Code, the seconded employee has the right to the payment of transport and accommodation expenses, as well as to a secondment allowance, under the conditions provided by law or by the applicable collective labor contract. The granting of these rights regulated by the labor legislation is instituted in charge of the employer to whom the secondment was ordered according to art. 47 paragraph 1 of the Labor Code.

The doctrine has clearly indicated that, ,,only for the first period, for a maximum of one year, it is a mandatory unilateral measure ... subsequently, for an extension, its agreement is mandatory" (Ștefănescu, 2017:417).

The measure of secondment is limited in time, with the possibility to be extended every 6 months, according to the legal provisions in force, without any restrictions, if there is, of course, the agreement of both parties. The legal literature has shown that the wording of the law is ambiguous, leaving room for interpretation and thus must take into account the agreement of the two employers on the one hand, the one who ordered the secondment and the one who is the direct beneficiary of the secondment, and on the other, we have the employee who has to express a valid and undefeated agreement to accept the undertaken measure (Țiclea, 2016:692).

In the case of magistrates, art. 58 par. 1 and 2 of Law no. 303/2004 on the Statute of Judges and Prosecutors provides that the secondment may be ordered only with their written consent for a period of between 6 months and 3 years, and may be extended for a period of up to 3 years, once. It should be noted that both in order to order the measure and in its extension, the written consent of the magistrate is imperative,

precisely in order not to violate a basic principle, that of the irremovability of magistrates.

The secondment measure is generated due to the express request made by a unit other than the one where the employee is employed. During the secondment, the employee carries out his activity based on the secondment decision issued by the employer who seconds him, at the request of the employer to which he is seconded.

According to the provisions of art. 47 para. 3 and 4 of the Labor Code, the seconding employer has the obligation to take all necessary measures so that the employer to whom the secondment was ordered fulfills in full and on time all the obligations towards the seconded employee, otherwise, ie if the the latter does not fulfill in full and on time all the obligations towards the seconded employee, they will be fulfilled by the employer who ordered the secondment.

In order to further increase the legal security at work of the seconded employee, the current codification of work provided in art. 47 para. 5 the fact that in case of divergence between the two employers, or in case neither of them fulfills its legal obligations, the seconded employee has the right to return to his workplace from the employer who seconded him, the right to go against either of the two employers and the right to demand enforcement of unfulfilled obligations.

Like any institution regarding employment relationships, the measure of secondment must be ordered by the employer within and in strict compliance with the rigors of the legislation in force. If the legal provisions are not taken into account or are violated in bad faith, the measure of secondment falls under the sanction of nullity, which may be total or partial. The nullity is total in the situation in which by violating or disregarding the law the secondment is impossible to carry out, and the nullity is partial if after the removal of the illegal clause, the secondment can be executed at least in part under legal conditions.

If the current labor legislation does not regulate the cases of termination of secondment, instead the legal literature paints the picture of these circumstances that determine „termination of secondment as an effect of termination of a previous secondment, death of the assignee employer, termination of employment, abolition of the position held by the employee at assignee employer, the dissolution of the assignee employer legal entity" (Lipscanu, 2013:119-120).

Another circumstance that determines the termination of the secondment is that the employer where the seconded employee works unilaterally applies the provisions regarding the termination of the individual employment contract or if he inserts other duties in the job description, without being related to the type of his work. Such a measure has as implications only the termination of the secondment, without affecting in one way or another the individual employment contract (Țiclea, 2016:695).

The legal literature has contained important clarifications of a special nature in connection with the termination of secondment as a result of the termination of employment:

-if the individual employment contract is to be terminated for objective reasons (dissolution of the original employer, reintegration of the predecessor), the seconded employee may conclude with the employer where he actually works a new contract.

-when the employee does not accept such a solution for his situation, the employer to which he belongs is obliged to offer him another job corresponding to his professional training or to take measures for his requalification (Țiclea, 2016:695).

It has been shown in the legal literature that ,,both the application of the disciplinary sanction (for the offense committed at the unit where the secondment was ordered) and its cancellation (if the secondment lasted uninterruptedly for at least 12 months), belong to the employer of the unit to which the offence was committed, and not to the employer who, under the Labor Code, ordered the secondment.

As such, the written decision (by which the unit to which the secondment took place disposed the cancellation of the sanction) is kept in the personal file of the existing employee at the latter unit" (Beligrădean, 2012:143).

4.Conclusions

Both the delegation and the secondment, as unilateral dispositions of the employer, are materialized in a written act ad validitatem as a consecration of the symmetry of the forms of legal acts (Brezeanu, 2017:134).

The decision to unilaterally amend the individual employment contract must be issued by the employer in compliance with the mandatory provisions contained in the Labor Code, namely to comply, under penalty of nullity, the period in which the measure can be ordered, 60 days in 12 months in case of delegation, respectively one year in case of secondment, to obtain the employee's consent in case of extension of delegation or secondment, to grant the employee the rights corresponding to the expenses of transport, accommodation, as well as granting a delegation allowance, respectively secondment allowances (Brezeanu, 2017:132).

In conclusion, there are fundamental differences between the two institutions regarding the change of the workplace, which make them individualize and delimit each other. Thus, the secondment measure involves a temporary transfer of the employee in question from the unit where he is employed, his employment contract being suspended, which is not implied by the delegation measure. Unlike delegation, secondment consists of temporarily assigning the employee to the unit where he is seconded, in which there must be a vacancy.

A substantial difference between the two instruments is that in the case of secondment the prerogative of applying disciplinary sanctions rests within the unit where the employee is seconded, and the most severe of the sanctions, that of termination of the employment contract, can be applied only with the consent of the unit that took the secondment measure.

In conclusion, any breach of the legal provisions in force once the secondment or delegation measures have been ordered entails the incidence of total or partial nullity, depending on the nature of the infringed interest, which means that the institution concerned has no legal effect.

References:

Auzero, G., Dockés, E., (2015). Droit du travail, 29e édition, Paris: Dalloz Publishing.

Beligrădean, Ș., (2012). Discuții cu privire la incidența radierii sancțiunii disciplinare și în cazul aplicării sancțiunii desfacerii disciplinare a contractului individual de muncă, în dreptul nr. 12.

Brezeanu, D., (2017). Regimul juridic al nulității în raporturile de muncă, București: C.H. Beck Publishing.

Gheorghe, M., (2015). Dreptul individual al muncii, București: Universul Juridic Publishing.

Moțiu, D., (2011). Dreptul individual al muncii, București: C.H Beck Publishing.

Panainte, S., (2017). Dreptul individual al muncii, București: Hamangiu Publishing.

Popescu, A., (2008). Dreptul internațional și european al muncii, ediția a II-a, București: C.H Beck Publishing.
Popescu, R., R., (2011). Dreptul muncii, curs universitar, București: Universul Juridic Publishing.
Popescu, R., M., (2017). Un al doilea loc de muncă- motiv temeinic pentru a refuza detașarea în altă localitate?, în Revist română de dreptul muncii, nr. 4.
Ștefănescu, I., T., (2017). Tratat teoretic și practic de dreptul muncii, ediția a IV- a, București: Universul Juridic Publishing.
Țiclea, A., (2005). Codul muncii adnotat și comentat, București: Lumina Lex Publishing.
Țiclea, A., (2009). Tratat de dreptul muncii, ediția a III-a, București: Universul Juridic Publishing.
Țiclea, A., (2012). Tratat de dreptul muncii, Ediția a VI-a, revăzută și adaugită, București:Universul Juridic Publishing.
Țiclea, A., (2014). Trat de dreptul muncii, București: Universul Juridic Publishing.
Țiclea, A., (2016). Tratat de dreptul muncii. Legislație. Doctrină. Jurisprudență. Ediția a X-a, actualizată, București:Universul Juridic Publishing.
Țop, D., (2018). Tratat de dreptul muncii, Doctrină și jurisprudență. Ediția a III-a revăzută și adăugită, București:Mustang Publishing.
Voiculescu, N., (2007). Dreptul muncii. Reglementări interne și comunitare, București:Wolters Kluwer Publishing.

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