THE ROLE AND IMPORTANCE OF THE FIXED-TERM INDIVIDUAL EMPLOYMENT CONTRACT

CARMEN CONSTANTINA NENU *

Abstract
The emergence of new forms of employment contracts, which do not materialize all the classic elements of an employment contract, has remained inevitable. European governments have responded to the problems of lack of activity caused by repeated economic crises, through the approval of new forms of employment, which are more flexible and less protective. These new forms of employment contracts must not create differences and discrimination between employees on the ground of the type of contract. In consequence, an analysis of one of these types of contracts, such as the fixed-term employment contract, is required, in terms of union and national rights. Such an analysis is important for a correct understanding of the role and necessity of employment relationships flexibility in a competitive economy.

Keywords: *employment contract, flexibility, fixed-term, protection, unional law.*

Introduction

All categories of employees should enjoy the same rights and obligations in the employment relationship, regardless of the employment contract under which they perform their work. This principle is the main reason behind all actions in this field. Elimination of discrimination between these contracts and the classic ones is the real challenge of European legislation in this area, so that labor market flexibility and its legal framework is consistent with the principle of protection of workers' rights, on equal terms, without being affected by the types of individual labor contracts whose parties they are.

Such an employment contract is also the one concluded for a definite period of time. Therefore, it was considered necessary to analyze both the normative aspects of such a contract and its role on the labor market, in terms of union and national law.

Paper content

The typical employment contract means the contract governing the legal relationship created between an employer and an employee, concluded for an indefinite period and for a full time, as the work is carried out in an area belonging to the employer, under its control and direction. Atypical employment contracts are by definition those that do not meet one or more of these elements.

Emergence of atypical employment contracts in European legislation was a result of successive economic crises that affected the labor market on the one hand, and on the other hand, a response to the need to create new jobs through flexible content adaptation of work relationships to new demands and requirements of economic operators. These operators do not always need a continuous and steady supply of labor and any activity taking place only on the premises. Atypical employment contracts are the result of social developments in terms of increased employment in the labor market of people who want to supplement their current occupations with others of a different nature.

Therefore, the Community institutions have adopted a series of initiatives aimed to analyze, motivate and regulate, at Community level, some of these atypical employment contracts. Paragraph 7 of the Community Charter of Fundamental Social Rights of Workers provides, inter alia, that achieving an internal market must lead to improved living and working conditions of employees in

* Lecturer, PhD, University of Pitesti **(**e-mail: carmennenu2006@yahoo.com).

the European Community. This will be done by adjusting these conditions by improving them, especially in the forms of employment contracts, other than permanent ones, such as fixed-term contracts, part-time work, work at residence and temporary work.

Considering these aspects, the Romanian Labor Code, which entered into force on March 1, 2003, approached the need for flexible types of contracts, covering the following types of employment contract:

- The employment contract concluded for an indefinite period;
- The employment contract concluded for a fixed period;
- The individual part-time employment contract;
- Temporary work agency employment;
- Work at home;
- Apprenticeship work contract.

Each of the above mentioned contract types has specific legal regulations that complement those applicable to the typical employment contract, to which the Labor Code allocates most of its rules, which shows that, in general, the characteristics of the standard individual labor contract are also found in its atypical forms. To emphasize this, in what follows, each type of employment contract will be examined.

The typical individual employment contract

The current legislation maintains, as a rule, concluding full-time individual contracts of indefinite duration, where work is provided in locations belonging to the employer. This regulation aims to legally protect an employee to whom this type of legal work relationship provides stability.

The Labor Code in force exhaustively governs the institution of the classic individual employment contract, to which it devotes 69 articles. These articles contain provisions relating to the conclusion, performance, amendment and termination of the individual employment contract. In order to clarify the various legal nuances of the typical employment contract one must consider that its elements should be reviewed, that is, the indefinite duration for which it is concluded, the full time work and the work place.

Indefinite duration The indefinite duration of an individual employment contract does not mean that it is completed by the appearance of old age social risk but that the duration of that contract is not known at the time concluded. As shown in the literature[1], by the indefinite duration of the contract it should not be understood that the employee is required to work all his life for that employer or that the employer is required to keep the employee in service to death, but the duration is not known during the time the contract was concluded.

Obviously, an individual labor contract concluded for an indefinite period may be terminated at any time whether the limiting conditions specified by the law are met. The indefinite contract may be terminated at any time by the employer or by the employee, provided that the employer is restricted in the ability to fire the employee by the fulfillment of conditions imposed by the legislature.

Full time employment To qualify as typical employment contracts of indefinite duration a contract must be completed full-time, or for a full time job. The normal working hours for employees with labor contracts, according to Art. 109, paragraph 1 of the Labor Code, are, on average, 8 hours per day and 40 hours a week. For young people aged up to 18 years working full time means, according to paragraph 2 of the same Article, 6 hours per day and 30 hours a week. Distribution of working hours in a week, according to art. 110, paragraph 1 is usually uniform, 8 hours per day for five days, two days of rest, the parties being able to opt for an unequal distribution in days subject to the limit of 40 hours a week.

[1] E. Cristoforeanu, *Teoria generală a contractului individual de muncă,* Editura Curierul Judiciar, Bucharest, România, 1937, p. 84.

The work place . A typical employment contract requires that the place of work belongs to the employer, who is obliged to provide the necessary working conditions for employees, according to his own rules set out in establishing and organizing documents and in internal regulations.

The number of typical employment contracts concluded for an indefinite period and full-time in our country is overwhelming. This form of contract still responds best to the state of current social relations of work, being an incentive for employees that, in terms of a certain stability of employment, are interested in professional development and professional fulfillment of duties – a beneficial attitude towards the employer.

Also, with indefinite contracts, employees are defended against possible abuses by employers, the legal rules governing dismissal. Also, the typical individual employment contract is a legal instrument favorable to employers, who need constant work provided by individuals with certain training. Moreover, the employers are directly interested in investing further in training order to obtain benefits. Employees with an employment contract for an indefinite period demonstrate more responsibility, being stimulated, depending on the organizational culture, to contribute directly to the growth and development of the activity for an employer where they intend to work for an indefinite period of time, to be promoted professionally.

Measures to adapt to change in the labor market led to the appearance, besides the full-time work relationship with an indefinite duration, of other types of work relationships which are more flexible: fixed-term employment, part-time work, work at home and labor through temporary employment agency. These employment contracts are characterized by a decrease in the employee guarantees.

The need to make flexible forms of employment compatible, compatibility required by employers, with employee rights protection ensured, is the challenge that must be confronted by the social policy and labor legislation in the national law.

The national regulation of the individual employment contract of limited duration.

An employee with a fixed-term individual employment contract is the employee whose work contract is directly concluded with an employer. Termination of this contract is caused by objective conditions such as completion of the period on which it was concluded, the ending of the activity, service or production.

Termination cannot be caused by the will of the contracting parties[2].

Regulation of the individual employment contract of limited duration conducted in the Labor Code deals with this type of contract as an exception to the rule of conclusion of permanent and full-time contracts. The material is included in art. 82-87 reprinted in the Labor Code. According to art. 83 of the Labor Code, cases where fixed-term employment contracts may be concluded are exhaustively and expressly provided, as follows:

- To replace an employee on account of suspension of his contract, unless that employee participates in a strike. This is the so-called replacement contract or interim agreement in other legislation and it proved an effective means of creating and distributing jobs where an employee has the right to suspend the employment contract under the laws and under the collective agreement;

- For growth and / or temporary change of the activity structure of the unit; the contract is called in other legislations contract for production reasons. These reasons, be it an unexpected

[2] See on the analysis of this type of employment contract, IT Stefanescu, S. Beligrădeanu, *Prezentare de ansamblu şi observaţii critice asupra noului Cod al muncii*, in „Dreptul" no. 4/2003, p. 5 et seq.; Al. Athanasiu, L. Dima*, Regimul juridic al raportuilor de muncă în reglementarea noului Cod al muncii,* in „Pandectele române" no. 4/2003; I. T. Ştefănescu *Modificările Codului muncii comentate*, Edition 2005 and 2006, Lumina Lex Publishing House, Bucharest; Al. Athanasiu, L. Dima, *Dreptul muncii*, All Beck Publishing House, Bucharest, 2005, p. 58-59; Al. Ţiclea, *Tratat de dreptul muncii*, Rosetti, Publishing House, Bucharest, 2006, p. 365-369; I. T. Ştefănescu, *Tratat de dreptul muncii*, Wolters Kluwer, Publishing House, Bucharest 2007, p. 403 et seq.; Magda Volonciu, *Comentariu (la art. 80-86), in Codul muncii, Comentariu pe articole, Vol. I art. 1-107*, by Al. Athanasiu, M. Volonciu, L. Dima, O. Cazan, C.H.Beck, Publishing House, Bucharest, 2007, p. 424 et seq.

number of orders or unusual reasons such as excessive absenteeism, preclude the possibility of the employer to meet production requirements;

- For development of seasonal activities, the contract is designed especially for agricultural campaigns;
- To temporarily favor certain categories of unemployed persons, under legal provisions issued for this purpose;
- To employ a person seeking a job, that within 5 years from the date of employment qualifies for old-age pension;
- To fill an eligible positions in trade unions and NGOs during the mandate;
- For employing pensioners who, under the law, can benefit from both salary and pension;
- In other cases expressly provided for by special laws, or for performing different projects or programs.

The maximum period for which an employment contract of limited duration may be concluded is 36 months. The parties may also conclude the contract for a shorter period and extend it within the maximum of 36 months, with no limit to the number of extensions. An individual labor contract extension must take place before the expiry of the original period for which the contract was concluded, because the individual employment contract is terminated at this time and, therefore, it cannot be extended since it is no longer valid.

During the 36 months, between the same parties, that is, employer and employee, no more than three successive fixed-term contracts can be concluded. Thus, if the employer has concluded an individual contract of employment with a person for a period of 2 months for the execution of certain work, they may conclude other two contracts with the same person, up to the maximum period of 36 months. One must consider as successive only fixed-term contracts whose duration cannot be longer than 12 months, without a break longer than three months between the first termination date and the date of conclusion of the next contract.

The individual fixed-term employment contract is concluded in written form, according to art. 82 paragraph 2 of the Labor Code. The content of the individual labor contract was approved by Ministry of Labor Order no. 64/2003, amended by Ministry of Labor Order no. 76/2003 and Order 1616/2011. It includes minimal provisions, and can be adapted to each type of employment contract. Obligation to register individual employment contracts in special registers for recording employees applies for any type of employment contract.

The fixed-term individual employment contract follows the same rules and procedures for conclusion in writing and for recording as the indefinite contract. Moreover, according to art. 87 par. 1 of the Labor Code, employees with fixed-term individual employment contracts will not be treated less favorably than comparable permanent employees, in terms of employment and working conditions, unless different treatment is justified on objective grounds. A'comparable permanent employee' refers to the employee whose individual employment contract is concluded for an indefinite period and who performs the same or a similar activity in the same unit, taking into account their qualifications, skills or training.

The fixed-term contract differs from the classical contract by conditions for termination, generally reaching the term and being terminated on the expiry date of the period for which it was concluded. Exceptionally, the employee may terminate the fixed-term contract, but only for justified reasons, which exclude his fault, otherwise risking paying some compensation to the employer for damages caused by improper exercise of his right to resign.

Limitations that the law requires for the conclusion of fixed-term employment contracts are intended to maintain the rule of conclusion of the indefinite duration employment contract. Thus, if the number of successive contracts had not been limited, one could notice some chain employment of the same employee. This chain employment is possible when each of the fixed-term contracts concluded by the same person has different objectives (e.g. replacement of the employee and fulfillment of a certain task).

Unnional legislation of the individual fixed-term employment

For rules on the conclusion of fixed-term individual employment contracts the provisions of Directive 99/70/CE, referring to the Framework Agreement of 18 March 1999 on fixed-term work concluded by ETUC, Confederations of Industry and of employers in Europe and the European Centre of Enterprises with Public Participation were considered. The signatories of the Framework Agreement recognize that the contracts of indefinite duration are and remain the general form of labor relations between employers and employees, but admit that these fixed term contracts respond, in certain circumstances, to labor market needs.

The Framework Agreement establishes the general principles and minimum requirements relating to fixed-term contracts, emphasizing the fact that their detailed application must take into account specific national realities[3]. It illustrates the will of the social partners to establish a framework in order to ensure equal treatment for fixed-term workers by protecting them against discrimination. For the purposes of the Community directive, a fixed-term worker means a person who has a contract or a fixed-term employment relationship concluded directly between an employer and a worker, where termination is caused by objective conditions such as reaching a specific date, fulfilling a specific task or the occurrence of a specific event.

Clause 4 of the Framework Agreement establishes the principle of non-discrimination, whereby workers with fixed-term contracts should not be treated differently from comparable workers with employment contracts concluded for an indefinite period, except to the extent that such different treatment is justified on objective grounds.

The Agreement establishes the general principles and minimum requirements relating to fixed-term work, recognizing that for their implementation one must consider realities of national, sectorial and seasonal situations. The main concern of the Community institutions and of the European social partners was to establish a framework that would ensure equal treatment and non-discrimination of employees with fixed-term contracts, protecting them against discrimination, given that more than half of those who signed these contracts are women.

The agreement applies to community employees who have a fixed term employment contract, excluding jobs available to a company through a temporary work agency, and is capable of not being applied to employment contracts of apprenticeship if so decided by the Member States and by the social partners.

1. The concept of fixed-term employment contract in accordance with Directive 99/70/CE[4].

According to clause no. 3 of the Agreement, the employee with the fixed term contract means 'an employee with an employment contract or employment relationship concluded directly between an employer and an employee, when the termination of work or employment relationship is caused by objective conditions such as the established date, completion of the activity or service or of production'.

Thus, as the intention of the Directive is to prevent discrimination, it establishes the concept of comparable employee with permanent contract, that is, 'an employee with a contract or employment relationship of indefinite duration, in the same unit, which performs work or an activity that is identical or similar, given their qualifications and the tasks they perform', and emphasizes that 'if there is no comparable permanent employee during the same unit, the comparison shall be made with reference to the collective agreement applicable or, where there is no applicable collective agreement, in accordance with legislation, collective agreements or practice'.

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[3] **See A. Popescu**, "*Dreptul internațional al muncii",* C.H.Beck publishing House, Bucharest, 2006, pp. 352-353.

[4] The analysis is based on the provisions of Directive 99/70/CE selection of information presented in *Relații de muncă. Modul de curs,* published by the Labour Inspection, Romania, Labour Inspection and Social Security, Spain, RO-03/IB/SO-01 PHARE Project, Oscar Print Publishing House, Bucharest, 2005, p 89-93.

In systems of the EU member countries there is no uniform regulation of fixed-term employment contracts. Given the main forms of different national legislations, they can be classified as follows:

- Fixed term contracts whose duration is determined according to a specific time;
- Fixed term contracts whose duration depends on achieving a specific fact, such as the completion of a job or return of the job holder.

The most important characteristic of these contracts in European legislation is usually causation. Besides offering the employee the chance to perform an activity or service, the fixed-term contract must have a specific reason that in some jurisdictions may be just one of those provided by law, while in other legislation any reason may be allowed, provided that it is not abusive.

2. Employment conditions for employees with fixed-term employment contracts.

The Directive highlights everything that is related to ensuring equal treatment for fixed-term contract employees and classic contract workers.

a. The principle of non-discrimination (clauses 4 and 6). The Directive establishes the general principle that 'employees with fixed-term contracts will not be treated in an unfavorable manner in relation to employees with comparable fixed contracts, solely for the fixed-term reason, unless there are objective grounds'.

The provisions for the implementation of the above mentioned clause must be defined by the Member States in consultation with the social partners and / or by the social partners, according to the Community law and the national law, to applicable collective agreements and to national practice. The Directive sets some provisions for the implementation of this clause on non-discrimination of employees with fixed-term employment contracts as compared to the employees with contracts of indefinite duration, namely:

- When deemed necessary, the pro rata principle will apply;
- Criteria relating to conditions of work experience will be the same for fixed-term contract employees and for employees with fixed agreements, unless different seniority criteria will be justified by objective reasons;
- Professional promotion: employers will inform employees on fixed term contract on vacancies in the unit, in order to guarantee equal chances of employment in permanent positions as for other employees. This information will be made available through a public notice displayed in an appropriate place in the unit.
- Access to training: as far as possible, employers will facilitate access of fixed-term contract employees to appropriate training opportunities to enhance their professional skills, career development and occupational mobility.

b. The rights to information and consultation (clause 7), in the following forms:

- Employees with fixed-term contract will be taken into account when determining the minimum number of employees to form representative bodies of employees under the national law and the Community law. Implementing provisions of this clause shall be defined by Member States in consultation with the social partners and / or by social partners according to national legislation, collective agreements and national practice.
- As far as possible, employers will try to facilitate appropriate information to employee representation bodies on fixed-term work in the unit.

c. Measures designed to prevent the misuse of fixed-term contracts. (Clause 5)

The directive states that, in order to prevent abuses resulting from the use of successive contracts or of fixed-term employment relationships, Member States, will introduce one or more of the following measures (consulted by social partners and by the law, collective agreements or practice, and / or the social partners, when there are no equivalent legal measures to prevent abuse, in order to consider the needs of different sectors and / or categories of workers):

- For objective reasons justifying the renewal of such contracts or of employment relationships;

- The maximum total duration of successive employment contracts or fixed-term employment relationships;

- Number of renewals of those contracts or employment relationships.

Member States in consultation with the social partners must decide under what conditions employment contracts or fixed term employment relationships are considered successive or are deemed concluded for an indefinite period.

3. Temporary chain employment. This type of employment is about the use of temporary contracts continuously and on just the same employee. Using chain employment contracts is permitted when each contract has a different focus (for example, replacing an employee and subsequently accomplishing a certain task) but not when the goal of all contracts is actually the same.

Employment without a reason or with a simulated reason. When temporary employment is aimed at achieving a specific activity, the activity must be well defined and have specific basis as related to the normal activities of the company. If an employee is hired to perform some work that is a regular and repeated activity of the company, a fraud would be witnessed. It is also a case of fraud in temporary employment when the cause of conclusion would be unreal or imaginary and would not really match a factual situation - such as the situation when the employee who is supposed to be replaced does not exist.

The misuse of temporary contracts for regular activities. Concluding fixed-term contracts may constitute a fraud in the case of exceptional circumstances of production during peak periods or periodic or seasonal activities. On the one hand, if the economic operator typically uses these contracts, then it is an obvious fraud, the contracts only being used in exceptional circumstances. On the other hand, the use of fixed-term contracts for seasonal work and regular activities such as agriculture, fisheries and tourism, has clearly determined that the courts law would consider the most appropriate in this case the so-called discontinuous fixed contracts. The employer, under this regime of contracts, would be forced to appeal to a seasonal employee at the beginning of the season.

Conclusions

In conclusion, the objectives of the Community Directive on fixed-term employment contracts are to create jobs, to avoid discrimination and differentiation between employees with employment contracts of indefinite duration and those with fixed-term employment contracts and also avoid abuse of the employer in the use of this type of contract. These objectives should, in principle, be reflected in the national legislation of Romania, as a Member State of the European Union.

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