

The Parties' Consent– A Distinct Reason for the Termination of the Individual Employment Contract. A Theoretical Study

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Abstract: This thesis deals with the problematic of the termination of the individual employment contract by means of the parties' consent as per Article 55 b) of the Labor Code and Article 74 (1) b) of the Sole Collective Labor Agreement at a national level for the years 2007-2010, no. 2895/2006. A distinction has been made between the initiative regarding the termination of the legal labor relationship by means of the parties' consent (employee or employer) and the fulfillment of the parties' agreement. It has been argued that the reasons which may lead to the agreement fulfillment for the termination of the employment contract may be reasons which relate to the employee as a person or reasons which have nothing to do with the employee as a person.

Keywords: individual employment contract, applicable collective labor agreement, parties' consent, termination of the labor relationship, collective redundancies

One of the most distinct labor forms¹ is the one provided for in Article 55 b) of the Labor Code, namely "the one resulting from the parties' consent, on the date set by the parties".

The individual employment contract is regarded by the labor legislation as the main source for the legal labor relationship based on which a natural entity becomes an employee. Nonetheless, the employment contract also constitutes a legal instrument which generates at the same time a labor relationship by means of the termination of the individual employment contract, and concretizes the parties' rights and obligations, provided for in the Constitution, such as the right to labor, the right to association, the right to strike, etc.

According to the Labor Code, the general rule presupposes the conclusion of the individual employment contract for an undetermined period, unless the contract in question is concluded for a determined period in the cases provided for in Article 81 a) –e), a period which may not exceed 24 months.

The individual employment contract is concluded solely based on the parties' consent, on the agreement thereof, as per Article 16 (1) of the Labor Code, and the materialization of this agreement is exclusively incumbent upon the employer.

¹ *The Labor Code* (approved by Law no. 53 of January 24th, 2003, published in the Official Journal of Romania, no. 72).

Taking into account that the legal labor relationship comes into existence by means of the two parties' mutual agreement, consent, assent – *mutuus consensus* – it is normal that the legal relationship in question be terminated by means of the parties' agreement, consent as well – *mutuus dissensus*.

Therefore, since the conclusion of the individual employment contract is the result of the parties' agreement – employee and employer – correlatively, the consent expressed by such parties may lead to its termination, according to a general law principle provided for in Article 969 of the Civil Code “Legally concluded agreements are binding for the contracting parties, but may be revoked by means of the mutual consent or due to legal reasons”. The principle is known as *pacta sunt servanda*.

However, the termination of the individual employment contract, as a result of the parties' consent on the date set by the parties, is a distinct reason for the termination of the legal labour relationship, strictly governed by Article 55 b) of the Legal Code and Article 74 (1) b) of the Sole Collective Labor Agreement at a national level for the years 2007 – 2010, no. 289/2006¹, which expressly stipulates “the parties' consent”.

Naturally, a distinction has to be made between the initiative of the termination of the employment contract by means of the parties' consent, which belongs both to the employee and the employer, and the fulfillment of the parties' agreement.

Irrespective of the initiative of the party requesting the termination, the parties' consent must be clear, unequivocal and expressly referring to the termination of the individual employment contract. The legal document by means of which the parties end the legal labour relationship must meet the general rules provided for in the legislation for the validity of any legal document and chiefly, so that the parties may materialize their agreement by means of a consent that meets the requirements of Article 948 of the Civil Code.²

With respect to this consent, we must mention the fact that, in order for it to be valid, it must meet certain requirements such as: it must come from a legally competent person³; it must be given with the special intention to produce legal effects⁴; it must be expressly manifested or it must be explicit; it must not be stricken by informality (error, fraud, violence)⁵; it must be serious and precise and

¹ Alexandru, Țiclea. (2007). *Tratat de Dreptul Muncii (Treaty on Labour Law)*. Bucharest: Editura “Universul Juridic”, p. 534.

² Ion, Păducel. (2008). *Dreptul Muncii și Securității Sociale (Labour and Social Security Law)*, vol. I, Craiova: Editura “Universitaria”. p. 83.

³ Civil ruling no. 148/2002 of the Pitești Court of Appeal, in the *Revista Română de Dreptul Muncii (Romanian Labour Law Magazine)*, no. 4/2002, p. 110.

⁴ Ioan Traian, Ștefănescu. (2007). *Tratat de Dreptul Muncii (Treatise on the labour law)*. Bucharest: Editura “Wolters Kluwer”, p. 336.

⁵ Civil ruling no. 233/1979 of the Cluj County Court, in “*Revista română de Drept*” (Romanian Law Journal) no. 8/1979, p. 53.

unequivocal.¹

Therefore, if the parties, by the free consent thereof, concluded a document containing rights and obligations, namely the individual employment contract, we deem that no other party and nothing opposes that the same parties make the opposite decision, ending it, and thus the document ceases to produce its effects.

One party's initiative – employee or employer – to terminate the legal labor relationship by means of the parties' consent constitutes an offer presented to the other party, and the respective offer must be precise with respect to its object: the termination of the individual employment contract.

No other clauses or transactions² by means of which the provisions favorable for the employee provided for in the individual employment contract or the applicable collective labor agreement may be included in the offer.

The offer concerning the termination of the employment contract refers solely to the discontinuation (ending) of the legal labor relationship based on the distinct reason stipulated in Article 55 61) of the Labor Code. In such a situation, the parties' agreement regards solely the individual employment contract and not a different cause (transaction) by means of which the parties decide the settlement of a labor conflict.

In conclusion, the parties' consent constitutes a way to terminate the individual employment contract, a distinct cause for the termination of the legal labor relationship between the employee (wage earner) and the employer (company, company manager).

The question arises whether the reasons which may lead to the agreement fulfillment for the legal termination of the labor relationship may be reasons concerning the employee as a person or reasons which have nothing to do with the employee as a person.

From this point of view, in our opinion, the issue regarding the termination of the individual employment contract based on Article 55 b) of the Labor Code, is to be discussed differently.

The termination of the individual employment contract by means of the parties' consent, if the physical and/or psychological inability of the employee for the job he/she was hired is ascertained by the medical examination institutions as per Article 61 c) of the Labor Code, may solely take place if the employee's consent regards the renunciation of the benefits provided for by both the provisions of Article 64 (1) of the Labor Code (namely, to the presentation of other vacant jobs within the company, compatible with the vocational training or the labor capacity determined by the occupational physician) and the provisions of Article 64 (5) of the Labor Code (namely, benefiting from a compensation provided for in the individual

¹ *Contractul Individual de Muncă – Prezent și Perspectivă (The Individual Employment Contract – Present and Perspectives)*. (2005). Bucharest: Editura Tribuna Economică, p. 264-265.

² OJEC L225 of August 12th, 1998.

contract or the applicable collective labor agreement). The employer would otherwise fail to meet the obligations concerning the employee's dismissal through the proposition to terminate the labor relationship by means of the parties' consent.

If the initiative regarding the termination of the labor relationship by means of the parties consent comes from the employee, he or she shall lose the benefits provided for in Article 64 (1) and (5) of the Labor Code, by deliberate renunciation.

If the initiative concerning the termination of the individual employment contract by means of the parties' consent comes from the employer and in case the employee may be dismissed for failure to meet the professional requirements as per Article 61 d) of the Labor Code, the employee may no longer benefit from the provisions of Article 64 (1) of the Labor Code. The same applies when the initiative to end the labor relationship comes from the employee.

With respect to the termination of the individual employment contract by means of the parties' consent due to reasons which have nothing to do with the employee as a person as per Articles 65 and 66 of the Labor Code, the provisions of Directive no. 98/59/EC on the approximation of the laws of the Member States relating to collective redundancies must also be taken into consideration.¹

According to Article 80 (4) of the Sole Collective Labor Agreement at a national level for the years 2007-2010, when establishing the actual number of employees to be collectively laid off, the employees whose individual employment contracts were terminated at the employer's initiative for reasons which have nothing to do with the employee as a person will be also taken into consideration, provided that at least 5 dismissals of this kind exist, at least 30 days before the expiry of the period stipulated in Article 79 c).

This text complies with the provisions of Directive 98/59/EC, since the EU standards also indicate that, for the calculation of the number of dismissals, the instances when the employment contract is terminated at the employer's initiative due to one or several reasons which have nothing to do with the employee as a person are also considered dismissals, provided that the number of such layoffs be at least five.

In the light of the EU Directive, the employer's initiative to terminate the employment contract by means of the parties' consent, if the reason for which he or she proposed the termination does not concern the employee as a person, is considered a dismissal due to reasons which have nothing to do with the laid off employees as persons.

Therefore, the instances when the individual employment contract is terminated at the employer's initiative due to reasons which have nothing to do with the employee as a person are considered dismissals. Consequently, the termination of the employment contract by means of the parties' consent is considered a collective redundancy if, through the agreement in question, at least five individual

¹ B. Teyssie, *Droit Européen du Travail*, 2e édition, Litec, Paris, 2002, p. 235-237.

employment contracts are terminated, which, together with the contracts terminated by means of laying off make up the minimum number of collective redundancies.

Therefore, the termination of the employment contract by means of the parties' consent is considered a dismissal, but does not constitute a dismissal, which means that the agreement between the employee and the employer must be achieved. With the proper dismissal the employer's consent is not necessary for the termination of the legal labor relationship. It must be added that the assimilation is admitted only in the case of collective redundancies, the termination of the individual employment contract by means of the parties' consent – as a distinct reason, maintains its specific regime. Even if it is integrated in the collective redundancies with respect to the necessary number for collective redundancies, the termination of the legal labor relationship by means of the parties' consent will be based on Article 55 b) of the Labor Code (Article 74 (1) b) of the Sole Collective Labor Agreement at a national level for the years 2007-2010 respectively).

In the case of the termination of the employment contract by means of the parties' consent, through such collective redundancies, we deem that the employees shall also renounce the benefits provided for in Article 67 of the Labor Code and those of Article 78 (1) of the Sole Collective Labor Agreement at a national level for the years 2007-2010 respectively; otherwise, the employer, through the proposition to terminate the labor relationship by means of the parties' consent, would fail to meet the obligations incumbent upon him or her by law in case the employee is laid off.

In conclusion, the reasons which may lead to the agreement fulfillment for the termination of the individual employment contract may be reasons which have to do with the employee as a person or reasons which have nothing to do with the employee as a person.

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