THE 9TH EDITION OF THE INTERNATIONAL CONFERENCE
EUROPEAN INTEGRATION
REALITIES AND PERSPECTIVES

The Employer's Obligation to Inform the Successful Candidate, Namely the Employee, on the Essential Terms of the Individual Employment Contract. National and European Normative Aspects

Carmen Constantina Nenu[1]

Abstract: In the context of a labor market with normative dimensions in constant evolution, the employee status is quite difficult. In consistence with the principle of protecting employee rights, labor law has imposed new measures that counterbalance the employer's position of authority within the employment relationship, both at European and national levels. These include the obligation to inform the employee about the essential elements of his working relationship, obligation established at European level by Council Directive 91/533/EEC of 14 October 1991, and at national level by the Labor Code.

Keywords: authority; labor legislation; balance; importance; role

1. Introduction

The individual labor contract legislation benefits from detailed regulation at labor law level, but the European Union countries do not have a unified vision of the types of employment contracts and their obligatory content. However, most states have not imposed formal requirements for typical individual employment contracts, these being validly concluded by the mere agreement of the parties. In these circumstances, given the emergence of new types of individual contracts of employment, the employee should know and have proof of the most important elements of the contract, essential for his relationship. It is therefore important to analyze which were the foundations of the adoption of European Directives in the field, on the one hand, and the extent to which it meets social needs and current national regulations, on the other hand.

2. National and European Legislation

Labor Code has adopted the provisions of Council Directive 91/533/EEC of 14 October 1991 on an employer's obligation to inform employees on the conditions applicable to the contract or employment relationship. It has also established that the employer shall, prior to the conclusion or modification of the individual employment contract (JOEC, 1991, L 288), inform the person selected for employment or, where appropriate, the employee, of the terms upon which they intend to include in the contract or to modify (Pătulea, 1998, p. 75 and the next; Tinca, 2004; Ştefănescu, 2005; Ţiclea, 2003; Volonciu, 2007).

[1] Senior Lecturer, PhD, Faculty of Law and Administrative Sciences, University of Pitesti, Romania, Address: Târgul din Vale Str., Pitesti 110040, Romania, Tel.: +4 0348 453 100, Corresponding author: carmennenu2006@yahoo.com.

In the preamble to Directive 91/533/EEC regarding the employer's obligation to inform the employee on the conditions applicable to the contract or to the employment relationship, its appearance is justified, given the fact that the development of new forms of employment in the Member States has multiplied the types of working relationships. Therefore, some Member States have considered necessary subjecting the employment relationship to certain formal requirements and, in general, the requirement that atypical employment relationship be formalized in writing and contain certain information depending on the type of contract. These formalities allow, at the same time, protection of the employee from possible lack of recognition of his rights and ensure greater transparency of the labor market.

However, given that national legislation had (Basuc & Nenu, 2005), prior to the adoption of this Directive, considerable differences in key issues such as the obligation to inform the employee about the essential elements of the contract of employment or employment relationship, the Council decided to adopt provisions harmonizing national laws, considering that Community action would be beneficial for improving living and working conditions of employees. Based on these considerations, and based on the provisions of section 9 of the Community Charter of Fundamental Social Rights of Workers, which recognizes the right of any employee to define working conditions established by law, by the collective agreement or contract of employment, according to each country's regulations, the Directive establishes at Community level the general requirement that each employee receive a document containing the essential elements of the employment contract or of the employment relationship.

The directive provides two alternative ways for transposing its contents into the national laws of Member States: approval of the legislative and administrative measures and /or the adoption of agreements by the social partners that would include the necessary provisions, provided that the Member State guarantees that the results sought by the Directive are fulfilled, ensuring the signing of these social pacts.

Directive 91/533/EEC does not expressly state which should be the scope of applying the right to information, but only nominates holders of the right to information, namely those who have an employment contract or an employment relationship. Defining the scope and its exceptions, is left to national laws, specifying that exceptions must meet certain limits, namely:

- the total duration of the employment contract does not exceed one month and /or weekly working time does not exceed eight hours;
- it must have a casual and /or specific character, on condition that there are objective reasons to justify failure to apply it.

In Romania, the provisions apply to all persons included in the scope of the Labor Code (Article 2 of Law 53/2003), without any explicit exclusion for applicability rules. Directive 91/533/EEC states in art. 2 para. 1 the employer's obligation to inform the employee to whom the Directive is applicable, the essential elements of the employment contract or of the employment relationship. In paragraph 2 of the same article it is stated that the essential information that the employer must provide to the employee will cover at least the following elements:

- identity of the parties;
- work place or, in the case of the lack of a fixed or predominant work place, the mention that the employee will perform work in various places such as office headquarters or home office of the employer;

- name, rank, quality or position category of the work which the employee carries out, or characterization or brief description of the activity;
- the start date of the employment contract or employment relationship;
- the expected duration of the employment contract or of the employment relationship, if it is a contract of employment or a temporary employment relationship;
- duration of paid leave to which the employee is entitled or, if this is not possible, means of providing and fixing the respective leave;
- periods of notice that the employer and employee must follow when terminating the employment contract or employment relationship, or, if this is not possible to be established at the respective time, the means of establishing the respective leave;
- the initial base salary, other key elements and periodicity of payment, to the employee is entitled.
- duration of the normal work day or work week of the employee;
- collective conventions and /or collective agreements governing the employee's conditions of employment, or in this case, the particular competent bodies, indicating the competent body or joint institution within which the respective contracts were concluded.

The Labor Code reproduces the contents of the Directive, including two new items to the minimum information to be transmitted over to the employee: information regarding work specific risks and duration of the trial period. It is to be noted that, by the amendments to the Labor Code, information refers to persons selected for employment and to employees, in case of modification of the individual employment contract. Information is considered to be fulfilled by the employer at the time of communicating his offer regarding the content of the individual employment contract or addendum, as appropriate.

The Directive contains specific information provisions for expatriate employees, who is identified with the one who has to carry out his work in one or more Member States, other than the State of the law and practice which the employment contract or employment relationship are subject to (Article four). These employees, in addition to the common information they are entitled to as any employee, are also entitled to additional information concerning the elements of the contract relating to labor deployment abroad. Thus, prior to departure, they will need to be made aware, at least, of the following information:

- duration of work performed abroad;
- the currency in which the salary will be paid;
- conditions for repatriation.

As in the case of the common law employment contract, certain items of information that the employer must provide the employee may derive from a reference to the laws or applicable collective agreements governing such matters, namely: the currency in which he will be paid and benefits in cash and in kind, related to expatriation.

The directive specifically provides its non-applicability in case that duration of work outside the country whose law and/or practice governs the contract or employment relationship does not exceed one month.

In turn, art. 18 para. 1 of the Labor Code provides additional information that the employer must provide the employee to provide services abroad. Among the information provided there is that set out in Art. 4. 1 of Directive 91/533/EEC, adding other information, namely; that related to climatic

conditions, to the main regulations of labor laws of the country where they are going to work, and to local customs whose failure to respect would endanger the life, liberty and personal security.

According to art. 17 para. 5 of the Romanian Labor Code, amendments agreed during performance of the contract and affecting the essential elements thereof, shall be evidenced by an amendment to the individual employment contract, unless the change is required by law or the applicable collective contract. Making the connection between Article 17 of the Labor Code and Article 41 of the same law that governs changes that can be made to the individual employment contract during its execution, the doctrine concluded that listing working conditions likely to be amended under Article 41 is not exhaustive but is amplified in all matters referred to in art. 17 para.3. The most important consequence of this reasoning is that any change that affects one aspect relating to art. 17 para. 5 of the Labor Code can only be achieved through an agreement between the parties, according to art. 41 para.1 unless the alteration occurs as a consequence of applying the law. In the latter case, the modification of the individual employment contract will be included in an employer's unilateral document.

3. Means and Deadlines to Fulfill the Obligation to Inform the Employee

The directive provides various means by which information requirements can be met by the employer: a written contract, a letter of employment, one or more documents or, in the absence of these documents, a written statement signed by the employer with the minimum essential elements of the employment relationship.

The deadline when the document or informative documents must be submitted generated contradictory interpretations from the beginning, because of faulty drafting of the provision of the Directive. From the original version it could be inferred that the employer had to hand over informative documents within maximum two months from the commencement of the work, while the employer's written statement, which has the character of document alternative and /or complementary to the previous ones, had to be submitted in the maximum period of one month from the commencement of the employment relationship. The directive's mistake was rectified by a correction (JOEC, 1992, L88) that replaced the one-month period provided for the individual statement submission with the general period of two months from the start of the employment relationship.

The employee must be notified about changes in elements of the employment contract or employment relationship within a maximum of one month from the date of entry into force of the change, under paragraph 1 of Article 5 of the Directive.

According to the Report of the Commission of the measures taken by Member States to implement the Directive, most countries recognize employee communication of the essential elements of the contract of employment or of the employment relationship through documents other than the employment contract.

In the Spanish legislation (Basuc & Nenu, 2005, p. 63) for example, although either party may request a written termination of the contract of employment, even during the employment relationship, there is no general obligation of written termination of all employment contracts. In fact, the typical employment relationship, that is, the indefinite and full-time contract, must adopt written form only in certain situations, agreed within programs promoting employment.

Probably that is why the Spanish regulations transposing the Directive provide the employment contract as a general document of information transmission, but at the same time offer other alternative or complementary informing means: written statements signed by the employer and other

documents containing certain minimum specifications that match those required by the Directive for this type of documents.

It is mandatory, therefore, for the employer to provide a written statement as an alternative document for the rest of the informing means, using one of these means being optional. This is a particular interpretation of a Community rule, since the Directive, as we have seen, provides written statements as replacing elements of the general outstanding elements.

The Romanian Labor Code establishes in art. 16 para. 1, as noted, an employer's obligation to conclude a written individual employment contract, and in par. 2 it is noted that if the written form is not respected, the individual employment contract is considered to be concluded indefinitely, any evidence for proving the employment relationship being admitted.

Article 17 para. 1 of the Labor Code provides a general obligation of the employer to inform the job applicant before the conclusion of the contract, on the terms which they intend to include in the employment contract. This information should include, at least, a number of claims which substantially coincide with what the directive calls "essential elements". These essential claims must also be mentioned in the contents of the contract to be concluded later, according to the express provision contained in art. 17 para. 3.

The Labor Code does not provide the existence of alternative documents other than the employment contract for providing that information to the employee, so if the obligation to conclude the contract in writing is not fulfilled, or, if the contract does not contain all the particular legal specifications, there is no default way to provide the employee a written document allowing accreditation of recognized or assigned working conditions.

4. Effects of Communicated Information and the Lack of Communication

Article 6 of the Directive states that its provisions are without prejudice to national laws and practices relating to: the type of contract or employment relationship, proof of the existence and content of the contract or employment relationship and the rules of applicable procedure.

One of the situations where the employee was prejudiced by the lack of information was addressed and resolved by the Court of Justice in its judgment of 4 December 1997 (Cases C-253 a 258, 1996, Kampelmann and others). By this judgment, the veracity of the alleged nature of communication of the essential elements.

Belonging to the employment contract or to the employment relationship, but also that the employer should be allowed to bring any evidence to the contrary and prove either that data in the communication are false, whether they were belied by the facts or not (para. 35 of sentence).

On the other hand, the consequences of the lack of communication to the employee of an essential element, were addressed in the sentence on February 8, 2001(Case C-350/99, Wolfgang Lange against Georg Schünemann GmbH). The Court of Justice determined that no provision of Directive 91/533 provides that an essential element of the contract of employment or employment relationship that was not mentioned in the document handed the employee or was not mentioned in it precisely be considered inapplicable (paragraph 29 of the sentence).

If the employee's lack of informing is absolute, the Court of Justice established in the same sentence, on February 8, 2001 the following: Directive 91/533(Sentence of the Court of Justice of the European Communities, 2001) neither requires nor prohibits the national judicial authority to apply the

principles of law that determine the burden of proof when one of the parties to the case did not meet the legal requirements of information, i.e. where an employer has not complied with the obligation to inform.

On the other hand, art. 9 para. 2 of Directive 91/533/EEC, provides that Member States have to take necessary measures to ensure that in any contract or employment relationship existing on the entry into force of the provisions adopted, pursuant to the Community act, the employer provides the employee that requests, within two months of receiving the application, the document or documents referred to in art. 3, completed, in this case, pursuant to article 4.1.

Article 8 of the Directive provides that Member States must incorporate in their legal systems the necessary measures, so that any employee who is penalized for failure to fulfill obligations resulting from enactment of the Community Act to be able to use his rights legally. Member States may determine that means of appeal be used only after the expiry of the 15 days deadline without response from the request that the employee will have to make to the employer. The formality of preliminary application is not a prerequisite for expatriate employees, or for those who have a temporary employment relationship or for those who are not covered by a collective agreement.

In the national law, art. 19 of the Labor Code provides the possibility of the employee to request the court to force to compensation the employer that has not fulfilled the required information obligation, the deadline for instituting the proceedings being 30 days from the violation of the obligation. It is to be noted that the Labor Inspectorate, the body responsible for checking compliance with labor laws and regulations for safety and health at work, may order measures to fulfill the obligation of the employer, without establishing liability offenses. Therefore, *de lege ferenda*, it is necessary to establish contravention liability of the employer not fulfilling their legal obligation to inform the employee.

5. Conclusions

The obligation to inform the employee about the essential elements of his working relationship is one of the most important obligations of the employer, having its origin in the position of authority he has in relation to his workers. Union regulations implementing the provisions in the law must be analyzed in light of the formal requirements of the individual labor contract, both the typical and the atypical forms. As individual employment contracts shall be concluded in writing as a condition of validity, the result is that the fulfillment of the obligation to conclude a written individual employment contract by the employer, also means the implementation of the obligation to inform the employee about the essential elements of their employment relationship.

6. References

Basuc, M. & Nenu, C. (2005). *Relaţii de muncă. Modul de curs/Labor relations. Course module*. Published by Law Inspectorate, Romania, Work and Social Security Inspectorate, Spain, Phare Project RO-03/IB/SO-01. Bucharest: Oscar Print.

Pătulea, V. (1998). Obligaţia de informare în formarea contractelor/Information obligation of contracts formation. *Revista de drept comercial/Journal of Commercial Law*, no. 1/1998.

Ştefănescu, I.I. (2005). *Modificările Codului muncii comentate/Amendments to the Labor Code commented*. Bucharest: Lumina Lex.

Ţiclea, A. (2003). Soluţii şi propuneri privind interpretarea şi aplicarea unor dispoziţii ale Codului muncii/ Solutions and proposals concerning the interpretation and application of provisions of the Labor Code. *Revista română de dreptul muncii/Romanian Journal of Labor Law,* no. 2/2003.

Ţinca, O. (2004). *Obligaţia de a-l informa pe salariat cu privire la clauzele esenţiale ale contractului individual de muncă/Obligation to inform the employee about the essential terms of the individual employment contract. Dreptul/The Law*, no. 10, pp. 50-63.

Volonciu, M. (2007). in *Codul muncii, Comentariu pe articole/Labor Code Comment on articles, vol. I, art. 1-107*, by Al. Athanasiu, M. Volonciu, L. Dima, O. Cazan. Bucharest: C.H. Beck.

*** Jurnalul Oficial al Comunităţilor Europene/Official Journal of the European Communities (1992) series L, no. 88, 8 July 1992, p. 44.

***Cases C-253 a 258/1996, Kampelmann and others.

***Case C-350/99, Wolfgang Lange against Georg Schünemann GmbH.

***Sentence of the Court of Justice of the European Communities 8 February 2001.

***Directive 91/533/EEC (1991), published in the Official Journal of the European Communities, Series L, no. 288.