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The Work Performed within Special Legal Labour Relations

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Abstract: Objectives The employment relationship is a contractual one and as such must have all the basic elements of an enforceable contract to make it legally binding. In strict contractual terms, the offer is made by the employer and formally accepted by the employee. **Prior Work** Once the acceptance has taken place, there is a legally binding agreement and an action will lie against the party who breaches that agreement, even though it may only just have come into existence. **Results** An employment contract, however, is unlike most other contracts. Although the parties will have negotiated the main terms, we shall see that a large number of terms will be implied into the agreement from all sorts of different sources and will not have been individually negotiated by the parties at all. This is what makes an employment contract so different from other contracts. **Value** We think this article is an important step in the disclosure of the problem raised by this types of labour performed in different legal labour relations.

Keywords: public servant; magistrates; cooperative members; profession

Introduction

Hereinafter we shall analyze a series of labour relations specific to certain professional categories in Romania, with their similarities and, especially, their differences with respect to the legal labour relation regulated by the Labour Code.

Concept and Terms. Solution Approach

Labour (service) relations of public servants

According to the dispositions of Law no. 188/1999 regarding the Statute of public servants², they are in service relations with the institutions and authorities they belong to, relations which are exercised on the grounds of the appointment administrative act [art. 4, para. (1)].

According to the legal provisions mentioned, the *public service* can be defined as the *ensemble of duties and responsibilities established on the grounds of the law, for the purpose of achieving the public power prerogatives by the central public administration, the local public administration and the autonomous administrative authorities* [art. 2, para. (1)].

Public services can be divided into three classes, different with respect to the level of education required for their fulfillment, respectively, long-term higher education, short-term higher education and high school education.

Under the aspect of salary, Framework-Law no. 284/2010 is applied, regarding the unitary salary payment of the staff paid from public funds.

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² Republished in the Official Gazette no. 365 of 29 May 2007, subsequently modified through Law no. 294/2010, published in the Official Gazette no. 877 of 28 December 2010.

Law no. 188/1999 constitutes *common law* for all categories of public servants.

Even though in the specialty literature there were disputes regarding the integration of public servants either in labour law or in administrative law, these discussions present preponderantly theoretical interest (Ticlea, 2014).

It is obvious that the public servants perform the activity on the grounds of the service relationship and not on the basis of the individual labour contract, but it is equally evident that the common law regime applicable to public servants is greatly similar to that of employees. In addition, the last regulations in the field (see: Law of social dialogue no. 62/2011; Framework-Law no. 284/2010 regarding the unitary salary policy of the staff employed in the budgetary sector; Law no. 329/2009 regarding the reorganizing of public authorities and institutions, the rationalizing of public expenditure, the support of the business environment and the observance of the framework-agreements with the European Commission and the International Monetary Fund), regulate identically in very many aspects the problematic of employees and that of public servants (see the institution of the collective labour contract and of the collective agreements which overlap in many aspects; labour conflicts, the strike, which is equally applied for employees and public servants).

Also, what brings them closer to the statute of employees is the fact that¹: they are allowed to associate in trade unions, allowed to resign, are disciplinary investigated and sanctioned, perform their activity within a work schedule of 8 hours a day and 40 hours a week, can perform extra work, have a rest leave, have a salary, can be delegated, relocated and transferred etc.

Still, what obviously separates them from employees is the fact that public servants are *bearers of public power*, which they exercise within the limits of their positions (Ticlea, 2014).

Still, within a public institution or authority, certain persons have the position of employee and others of public servant, but their duties are similar or identical (Ștefănescu, 2014).

Therefore, given the specific of the activity and the powers conferred, public servants are subjected to distinct regulations, but according to art. 117 of Law no. 188/1999, the statute of the public servants is completed with the provisions of the labour legislation, to the extent to which it does not contradict the legislation specific to the public service.

Both the public servant and the employee are in a *typical labour legal relation*: as the employee, the public servant is subordinated, from the legal (and economic) point of view to his employer, which pays him a salary; as an equivalent compensation of his work. It must be noted that the High Court of Cassation and Justice also qualified the relations in which a public servant is with the authorities and public institutions as labour relations².

Not last, the Court of Justice of the European Union, in the current context, considered that public servants must be assimilated to workers in what concerns the application of the rules of the free travel of persons (Decision of 24 March 1994 in Case 71/1993 *Van Poucke*).

All these legal regulations in effect in the matter of the public service emphasize the fact that there is no basic impediment in the path of Romania's ratification of Convention no. 151 (1978) regarding the protection of the organization right and the procedures for the establishing of the working conditions within the public service.

¹ Through Decision no. 1221/2009 of the Constitutional Court, published in the Official Gazette no. 759 of 6 November 2009, it was held that "public servants represent a separate category of employees, which is different through the specific legal status".

² Decision no. 77 of 5 November 2007, published in Official Gazette no. 553 of 22 July 2008.

Labour Relations of Soldiers and Professional Officers

The profession of military personnel presupposes an activity meant to ensure the functioning, improvement and management of the military body, during peace and war times. The military personnel is subjected to a special legislation, respectively Law no. 80/1995 regarding the Statute of the military staff¹.

According to this law, by *military personnel* are understood the Romanian citizens to whom the rank of officer, military master or petty officer has been granted, in connection to their military and specialty training (art. 1).

Given art. 16 para. (3) of the Constitution, which states that public service may be civil or military, it means that professional military staff are not employees, in the meaning of the Labour Code.

With the elimination of the mandatory military service, through Law no. 446/2006 regarding the population's training for defense² and through Law no. 384/2006 regarding the Statute of soldiers and professional officers, the legal framework for this distinct body of military staff was regulated.

According to art. 1 para. (2) of Law no. 384/2006, soldiers and professional officers are employed on the basis of an *employment contract* which is, in reality, an *individual labour contract of a particular type* (Beligrădeanu, 2003), concluded for a determined period of 4 years, with the possibility to extend upon expiry; for a period of 2 or 3 years.

From the corroboration of the legal provisions, it is derived the fact that, in order to gain the capacity of professional soldier, the following requirements must be met:

- the person in question, woman or man, to be Romanian citizen with his/her domicile in Romania;
- to be maximum 45 years old;
- to have been selected on the basis of his/her application;
- to have followed a training program;
- if the person is reservist, to have given up, in writing, the ranks gained before;
- to have taken the military oath (it is taken before appointment).

The parties to the contract are the professional soldier and the employing military unit.

This particular type of individual labour contract presents the following characteristic traits:

- the enlisted person is subordinated to the employing military unit; with the observation that this type of subordination that follows military discipline is much more severe than the subordination of a regular employee;
- the contract is named, it is on determined time, *intuitu personae*, is concluded in writing and it is commutative;
- the labour relations are executed through successive actions;
- the enlisted men receive a salary for the activity performed, called pay (T.N. In original, soldă);
- the enlisted men may be delegated, relocated or transferred, they have specific rights and obligations, they answer disciplinary or materially, and the labour relation may end through

¹ Published in Official Gazette no. 155 of 20 July 1995, as subsequently modified and completed.

² Published in Official Gazette no. 990 of 12 December 2006, as subsequently modified and completed.

resignation (Țiclea, 2014).

Labour relations of magistrates

The magistrates' labour relations caused numerous controversies in the specialty doctrine, where several opinions were formulated, as follows:

- the magistrates would be part of the category of dignitaries because they benefit of a gross monthly employment indemnity and are appointed by the President of Romania, at the proposal of the Superior Council of Magistrates;
- the magistrates would have a position involving public power, being subjected to statutory regulations;
- the magistrates would constitute a special category of personnel which is part of the judicial authority and which has the mission to exercise judicial power, being in a labour legal relation with the authority they are part of;
- the magistrates can be considered as occupying a public office because the public service is not only that exercised by public servants; the interpretation of the concept of public service is not limited to that indicated in art. 2 of Law no. 188/1999, but also comprises the authority public offices, among which, that of the magistrates¹.

The relevant provision are found in Law no. 303/2004 regarding the statute of judges and prosecutors² which omits, however, to state the nature of the magistrates' labour legal relation.

Certainly, magistrates are part of those exercising public power, but also certain is the fact that they are in a labour relation, their appointment to office being impossible to conceive except with the consent of those in question. The High Court of Cassation and Justice itself stated³: “the magistrates constitute a special category of staff which perform their activity on the basis of a *sui generis* labour relation”.

The statute of magistrates presupposes certain particularities:

- any collective and/or individual negotiation with respect to the indemnities and labour conditions is out of the question;
- they do not subordinate to any hierarchical body;
- they enjoy immovability – judges and special stability– prosecutors;
- they are incompatible with any other public or private office, except in higher education;
- cannot strike;
- even though reference is made, with respect to magistrates, top the “performance of their activity on the basis of a labour legal relation”, in which one party to the labour relation is the magistrate (having the capacity of servant/clerk, *lato sensu*), it cannot be accurately established which is the other party to the labour relation, which would have the capacity of

¹ Dec. CC no. 235/2011 regarding the unconstitutionality exception of art. 69 para. (1) letter e) of Law no. 360/2002 regarding the Statute of the policeman, published in Official Gazette no. 278 of 20 April 2011.

² Republished in Official Gazette no. 826 of 13 September 2005, as subsequently modified and completed.

³ Decision no. 46/2008, published in Official Gazette no. 853 of 18 December 2008.

employer. In this sense, we agree with the opinion formulated in the doctrine (Ștefănescu, 2014), that, in reality, in this particular case, the employer's duties would be shared between several legal entities, respectively, on the one hand, the High Court of Cassation and Justice or the Prosecutors' Office attached to the High Court of Cassation and Justice; the Appeal Courts or the Prosecutors' Offices attached to the Appeal Courts; the Tribunals or Prosecutors' Offices attached to the Tribunals, and, on the other hand, the Superior Council of Magistrates and the President of Romania.

In conclusion, the labour legal relation of the magistrates is a legal relation which has as basis the expression of the agreement of will, it is a *contract – not named*, of public law, concluded with the Romanian state, represented by the Superior Council of Magistrates and the President of Romania.

Labour relations of cooperative members

The labour relations of the cooperative members are regulated according to the dispositions of Law no. 1/2005 regarding the organization and functioning of the cooperative enterprises¹.

Within the cooperative enterprise, the activity is performed by persons who:

- have exclusively the capacity of cooperative members;
- have a double capacity of cooperative members and employees;
- are exclusively employees.

According to art. 33 para. (1) of Law no. 1/2005, between the cooperative company and the cooperative member, the following categories of relations may exist:

- *patrimonial*, materialized in the obligation of the cooperative member to submit the shares;
- *labour*, in case of cooperative members associated for labour and capital, on the grounds of the individual labour contracts or of the individual labour agreement, as the case may be, concluded with the cooperative enterprise whose member he is;
- *commercial-cooperative* for the product deliveries and service provisions made by the cooperative member for the cooperative enterprise; as independent economic agent.

The essential difference between the cooperative labour relation and the legal relation based on the individual labour contract is the fact that the first has as basis an association agreement which generates a complex legal relation.

In the specialty literature was also formulated the opinion according to which a distinct branch of law should be considered – cooperative law (Athanasiu, 2005).

At present, the labour relations within the cooperative environment do not make the object of analysis in any branch of law. We agree with the opinion formulated in the doctrine according to which it is possible and, at the same time, justified, at present; to analyze the labour relations of cooperative members within labour law, due to the similarities existing with the labour relation of employees – art. 33 of Law no.1/2005 expressly refers to the individual labour contract, falling under the requirement of art. 2 of the Labour Code (in order for this Code to be applicable, a labour contract must exist) (Naubauer, 2012).

¹ Published in Official Gazette no. 172 of 28 February 2005.

Labour relations of priests

To the legal relations of this professional category are applied the specific regulations of each religious faith and, as addition, the regulations of the Labour Code; as common law.

The regulations in the Statute for the organizing and functioning of the Romanian Orthodox Church, recognized through Government Decision no. 53/2008¹, define a special regime of the clerical staff, respectively:

- conditions of appointment;
- incompatibilities;
- appointment;
- financial resources for salaries;
- granting of the rest leave;
- disciplinary jurisdiction;
- transfer;
- revocation from office.

Labour relations of the members of the diplomatic and consular core

The situation of the members of the Diplomatic and Consular Core is regulated through Law no. 269/2003 regarding the Statute of the Diplomatic and Consular Core of Romania²; the members of this Core are, usually, career diplomates and have a specific statute conferred by the duties and responsibility due to them.

According to art. 2 of Law no. 269/2003, the following persons have the capacity of members of the Diplomatic and Consular Core:

- the minister of foreign affairs;
- the secretaries of state and under-secretaries within the Ministry of Foreign Affairs;
- the general secretary and the deputy general secretary within the Ministry of Foreign Affairs;
- the diplomatic and consular staff performing their activity in the central administration of the Ministry of Foreign Affairs, within embassies and permanent missions attached to the international organizations, as well as within the consular offices of Romania, including the persons coming from the Foreign Trade Department and from other ministries and institutions, throughout the period of being sent on mission abroad with diplomatic or consular rank.

According to art. 3 para. (1), “the statute of the diplomatic and consular core of Romania is completed with the provisions written in the labour legislation and in the statute of public servants, unless this statute establishes differently”.

Still, the provisions of Law no. 269/2003 are contradictory, in the sense that diplomats are treated as both employees and public servants. Thus, according to art. 51 para. (1) letter f), the end of the capacity of

¹ Published in Official Gazette no. 50 of 22 January 2008.

² Published in Official Gazette no. 441 of 23 June 2003, as subsequently modified and completed.

member of the Diplomatic and Consular Core is also regulated “through the disciplinary termination of the individual labour contract with the Ministry of Foreign Affairs” and through art. 67 is established the possibility to suspend such contracts, from here being derived the fact that the diplomats have the capacity of employees; on the other hand; according to art. 5 of Law no. 188/1999, it is established that the public servants *performing their activity within the diplomatic and consular services* may benefit of special statutes.

In conclusion, except for the members of the Diplomatic and Consular Core of Romania, indicated in art. 2 para. (1) letters a)-c) of Law no. 269/2003, the nature of the labour legal relation for the other diplomats should be clarified.

In any case, diplomats are in a labour employment relation with the Ministry of Foreign Affairs, regardless of its legal nature; if it is based on the individual labour contract or the administrative act of appointment to office (Athanasiu and others, 2007).

The legal relations of legal counselors

The organization and exercise of the profession of legal counselor is regulated through Law no. 514/2003 regarding the organization and exercise of the profession of legal counselor¹.

According to art. 1 of the law, the role of the legal counselor is to *protect the legitimate rights and interests of the state, of the central and local public authorities, of the public and public interest institutions, of the other public law legal entities, as well as of the private law persons, in the service of which he is, according to the Constitution and the laws of the country.*

The legal counselor may have the capacity of employee of that of public servant (art. 2 and 3 of Law no. 514/2003). Thus, the profession of legal counselor cannot be a liberal profession. As such, the exercise of the profession of legal counselor is excluded outside the labour (service) relations established by law. Thus, the exercise of the profession of legal counselor is incompatible with the capacity of lawyer, as well as with any other profession authorized or with paid salaries in the country or abroad [art. 10 letter a) and c)].

As a consequence, the applications for the authorization to establish and register consultancy, assistance and legal representation companies were and are inadmissible.

According to art. 2 of Law no. 514/2003, the *profession of legal counselor is exercised either on the basis of a service relation, in the conditions established by Law no. 188/1999 regarding the statute of public servants, or on the basis of a labour legal relation, following the conclusion of an individual labour contract according to the dispositions of the Labour Code.*

At the same time, through art. 11 of Law no. 514/2003 it is indicated that the exercise of the profession of legal counselor is compatible with the university and legal research didactic activity, with the literary, cultural and *publishing, not paid*, activity. This provision is totally illogical and inequitable, given the fact that any other public servants or employees may exercise their function/profession in parallel with the employee publishing activity².

¹ Published in Official Gazette no. 867 of 5 December 2003, subsequently modified and completed.

² Still, the Constitutional Court, through Decision no. 300/2004, published in Official Gazette no. 734 of 13 August 2004, established the fact that art. 11 of Law no. 514/2003 is constitutional.

The Situation of Attorneys Receiving a Salary within the Profession

The organization and exercise of the profession of attorney is regulated through Law no. 51/1995 for the organization and exercise of the profession of attorney, republished¹.

In the specialty doctrine (Baías, 1995), the practice of law as an attorney is defined as being that *liberal profession whose members, attorneys registered in Bars, give consultations with legal character, draft legal documents, assist and represent individuals and legal entities before the courts of law, the public authorities or institutions, as well as before any other subject of law, for the purpose of defending and capitalizing, within the limits of the law, on the rights, liberties and interests of their clients.*

Law no. 51/1995 establishes the fact that the profession of attorney is *free and independent*. As a consequence, the lawyers cannot have the capacity of employees, hence, they cannot be part of a labour legal relation.

According to art. 5 of the law, attorneys can exercise their profession in individual offices, associated offices, civil professional societies and limited liability civil professional societies.

In the associated offices, the civil professional societies and the limited liability ones, the tenured or associated attorneys can exercise their profession together with the established or the trainee lawyers, who have the capacity of collaborators. Hence, the civil professional society may also have *employed attorneys* [art. 5 para. (5) of Law no. 51/1995].

Thus, the collaborator attorneys performs his activity on the basis of a collaboration contract, of civil nature, and the attorneys employed within the profession conclude an employment contract.

The employment contract is not an individual labour contract and is not subjected to the labour legislation; it is concluded in written form between the tenured attorney of the office and each separate attorney.

According to art. 207 of the Statute of the profession, the employed attorney is not entitled to his own clients and in his professional activities must mention the office he works for. Moreover, it is specified that the employed attorney “undertakes to dedicate the entire agreed working time to the fulfillment of the duties entrusted by the society, with his full professional capacity”. Considering that the employed attorney receives an amount of money from his employer, the civil professional society, it can be deemed, as a rule; that there is a form of economic subordination between the two parties (however, no legal subordination).

In conclusion, the situation of attorneys employed within the profession is unclear from the viewpoint of the applicable legal regime, because:

on the one hand, the profession of attorney presupposes the performance of an activity freely and independently and the position of employee presupposes legal subordination and dependency towards the employer;

on the other hand, it is noticed a lack of correlation of the dispositions from the Labour Code – art. 1 para. (2) – which establish that “this code also applies to the labour relations regulated by special laws, only to the extent to which they do not contain specific derogatory dispositions” and art. 15 letter a) of Law no. 51/1995 – which regulates the possibility of the existence of the labour legal relation through the performing of an activity paid in the form of a salary, by an attorney within his profession, without

¹ Republished in Official Gazette no. 98 of 7 February 2011, as subsequently modified and completed.

the special law establishing specific derogatory dispositions from the Labour Code (Naubauer, 2013).

not least, in the specialty doctrine the opinions are divided: part of the specialists go in the direction of qualifying this contract as an “atypical labour contract”(L.Dănilă, 2008), while others claim “we are in the presence of a contract different from the labour contract, having a special legal regime, regulated by the Statute of the attorney profession”(T:Briciu, 2012).

In our opinion, in general, the liberal professions, especially that of attorney, cannot be exercised as employee, except as exception; attorneys may cumulate the capacity of member of the liberal profession with that of employee only in higher education.

Situation of Trainee Notaries

According to art. 1 of Law no. 36/1995, *the notary activity ensures to the individuals and legal entities the establishment of their non-litigious civil or commercial legal relations, as well as the exercise of their rights and the protection of their interests.*

The notary activity is performed by public notaries (art. 2) who have the statute of an *autonomous function* (art. 3).

The activity of public notaries is performed in offices, where one or several associated public notaries may act.

The full tenured notary of the office may hire trainee notaries and administrative staff (art. 14).

According to the Statute of the profession, it is stated that the trainee notary is employed through an individual labour contract, concluded for a determined period of 2 years, respectively, for the duration of the traineeship (art. 55). Thus, trainee notaries are employees of the notary offices, being in typical labour relations with their employers (full tenured notaries), are in a subordination relationship with them and receive a salary for the work performed.

After passing the public notary exam, they lose the capacity of employee, becoming tenured in notary offices.

The Situation of the Trainee Officers of the Court

According to art. 12 of the Statute of the National Union of Officers of the Court, this profession is *liberal and independent.*

The officers of the court exercise a public interest service, consisting in the forced execution of the civil dispositions in the executory titles (art. 1 of the Regulation for the enforcement of Law no. 188/2000 regarding the officers of the court¹).

The officers of the court are appointed by the minister of justice and fulfill a public interest service; still, they are neither public servants, nor employees. Officers of the court can organize and operate either in an individual office (a single officer of the court) or two or more officers of the court may associate within a professional society (the association is of civil nature and excludes the subordination of the associates).

However, in either of the organization forms, the tenured or associated officers of the court may hire trainee officers of the court and auxiliary staff. The trainee officers of the court are those who have

¹ Published in the Official Gazette no. 64 of 6 February 2001, as subsequently modified and completed.

been admitted to the profession and who will conclude an individual labour contract for a determined period of 2 years with the tenured officer of the office or the professional society. Hence, they are in typical labour relations; subordinating to their employers and receiving a salary for the work performed. The duration of the individual labour contract is equivalent to the duration of the professional training period, which is calculated from the moment of concluding the labour contract.

After passing the profession tenure exam, the trainee officer of the court loses his capacity of employee and starts exercising a liberal profession (Popescu, 2014).

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