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On the Possibility of the Employer to Terminate Unilaterally the Labor Contract of a Pregnant Employee during the Probationary Period

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Abstract: We intend to analyze the way in which the provisions of art. 31, par. 3 of the Labor Code concerning the possibility for the employer to terminate the labor contract unilaterally only by written notice, without notice and without having to justify during the probation period the legal provisions establishing the prohibition of dismissal of a pregnant employee, who has previously notified her condition during the probation period, respectively with the provisions of art. 60 par. 1, letter d of the Labor Code, art. 21 from G.E.O. no. 96/2003 on the protection of maternity and art. 10, par. (6) of the Law no. 202/2002 on equal opportunities and treatment of women and men.

Keywords: Labor Code; pregnant employee; written notice

The probationary period is a common option in employment relationships between employees and employers, temporary working agents and temporary workers, and it is an extra chance for both parties to check whether the conclusion of a contract of employment is the most inspired choice. There is a chance to discover, as an employer, if it's worthwhile to invest in the following years in the employee you submit to a probationary period, and for the employee, it is a chance to find out if that job is what he is looking for.

Perhaps the best known aspect of the probationary period is that the employer and the employee can also terminate the employment relationship by simple notification, without motivation, without notice, according to the provisions of art. 31, par. 3 of the Labor Code.

Thus, in the context of a legislation which strictly and restrictively regulates the employer's right to terminate an employment contract, the Romanian legislator provided - by regulating the probationary period - the possibility for the employer to unilaterally terminate the employment contract by a simple written notification, without giving a notice and without motivating its decision to terminate.

However, this "exceptional" employer privilege has often opened the way to abuses, a fact that has made it necessary to establish clearly the legal nature of this mode of termination of employment.

The way in which this type of termination of the employment contract is technically interpreted during the probationary period is relevant in the practical application of the prerogative to terminate the employment relationship.

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In practice, termination of employment under the provisions of art. 31 par. 3 Labor Code was considered either a dismissal for reasons of professional misconduct or a unilateral denunciation of the employment contract.

In order to know exactly how to deal with certain situations in practice, the legal impediments to the termination of the contract, it has become important to establish this qualification for termination of the employment contract during the probationary period.

Therefore, the need to determine whether the employer has the legal opportunity to terminate unilaterally the employment contract of a pregnant employee who is in the probationary period resulted from the numerous litigation brought by the courts, which were asked to determine whether, for example, it is legal that the employer - as soon as he has learned of the pregnancy status of his employee, issued the notice of termination of the employment contract, relying on the fact that the employee was still in the probationary period.

Under these circumstances, it is the question whether the employer, as soon as the employee's pregnancy status was acknowledged, had the obligation of complying to respect the legal prohibition laid down by three distinct normative acts, namely not to terminate the employment relationship with the employee.

According to art. 60 par. 1, letter d of the Labor Code states: "*The dismissal of employees cannot be disposed (...) during the period in which the employed woman is pregnant, insofar as the employer became aware of this fact prior to the issue of the dismissal decision*."

At the same time, G.E.O. no. 96/2003 on the Protection of Maternity, updated in 2011, prohibits the dismissal during the period of pregnancy by the provisions of art. 21: "*It is forbidden for the employer to terminate the employment or service relationship in the case of the pregnant employee who informs the employer in writing of his physiological state of pregnancy and encloses a medical document issued by the family doctor or the specialist doctor who certifies her State, for reasons that are directly related to her condition."*

According to art. 10, par. (6) of the Law no. 202/2002 on equal opportunities and treatment between women and men, "the dismissal is forbidden during the period when "*the employee is pregnant or is on maternity leave".*

All three normative acts regulate the same prohibition, namely that of prohibiting the dismissal of a pregnant employee who previously notified her condition during the probationary period. (Țiclea, 2014)

The prohibition on dismissal during the period in which the employee is pregnant has as aim (even to the detriment of the employer's interests) the insurance of the protection of the employee, which is vulnerable during this period so that such a measure cannot seriously harm the health of the mother or the child.[1]

Given that the legal nature of the termination of the employment contract during the probation period was qualified in the case law of the Constitutional Court as "the possibility of unilaterally denouncing employment relationships without being bound by the obligations to be observed in the event of dismissal or resignation"[2], confusion may arise over the application of the G.E.O. no 96/2003 on the

[1] Court of Appeal Bucharest, VII Civil Division, for cases concerning labor conflicts and social insurances, decision no. 3846 / R / 2009, in (Uta, Rotaru, & Cristescu, 2010, p. 72)
[2] Decision no. 653 of 17 May 2011 on the objection of unconstitutionality of the provisions of art. 31 par. (3) of the Law no. 53/2003 - Labor Code.

Protection of Maternity at Work, which establishes the prohibition of employers to order the termination of employment relationships in the case of pregnant employees for reasons directly related to their condition.

Exceptional provisions of art. 60 par. (1) letter c) of the Labor Code governing the dismissal of the pregnant worker are strictly interpreted, the text referring only to the hypothesis in which the employer was aware, at the date of issuing the dismissal decision, of the pregnancy status of the dismissed employee, and not in the situation where, for example, the employee informed the employer of her state after the date of issue of the dismissal decision, even within the period of notice before the decision took effect.

Therefore, if the contestant had not been "pregnant" according to the law, the employer could easily follow the procedure regulated by art. 31, par. 3 of Labor Code, unilaterally terminating, by notification, the labor relations, even without motivation.

By interpreting this provision in the light of the jurisprudence referred to above, it is clear that the termination of the employment contract would be possible in so far as it is not determined by the state of pregnancy.

In a case[1] which may help to interpret this reasoning, the Court of Justice of the European Union has ruled that the provisions of Art. (10) of Directive 92/85 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding and which require for the pregnant workers to be protected against dismissal must be interpreted in the sense that they are opposed to some national rules which allow the revocation of an administrator who is pregnant within the meaning of the Directive, and the decision to revoke is essentially based on her pregnancy status.

By interpreting this solution, we can understand that it is not excluded for the termination to be also disposed to pregnant workers, insofar as it is not related to pregnancy status and, of course, also complies with the other applicable legal requirements.

The Ploieşti Court of Appeal also appears to apply this position, stating in its decision no. 1148 of October 23, 2014, referring to the termination of the employment contract of a pregnant employee that it is not about "a dismissal but another legal institution, namely the termination of the probationary contract, based on the notification issued by the employer. Therefore, the provisions of Article 60, paragraph 1, Labor Code regarding the protection of pregnant women refers strictly to the dismissal measure, and it cannot be extended to other situations, being special provisions of strict interpretation.

Therefore, we believe that as long as during the judicial investigation, the pregnant employee whose contract of employment has been terminated during the probationary period, by simple notice, without notice and without motivation, demonstrates - by unambiguous evidence - that it has in fact made a dismissal as a result of her pregnancy, the unilateral termination of the contract by the employer is unlawful and the notification must be annulled by the court.

In conclusion, we consider that although the reason for the termination of the employment contract needs not be one of the limiting ones listed in art. 61 and art. 65 of the Labor Code, in the event of a contestation by the former employee, the termination must be reasonably justified and not the result of discrimination or abuse.

[1] Case C-232/09 - Dita Danosa v LKB Lizings SIA

Bibliography

Țiclea, A. (2014). Interdicția concedierii salariatei gravide/Prohibition of dismissal of pregnant worker. *Revista Română de Dreptul Muncii nr. 1*.

Uta, L., Rotaru, F., & Cristescu, S. (2010). Incetarea contractului individual de munca/Termination of the individual labor contract. *Revista romana de jurisprudenta nr. 5-6/The Romanian Journal of Jurisprudence no 5-6*, 193-197.