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WHAT IS ALWAYS NOT KNOWN ABOUT THE ELEMENTS OR CLAUSES WHICH ARE *UNCALLED* BUT MANDATORY FOR THE CONTENT OF AN „STANDARD" INDIVIDUAL LABOR CONTRACT?

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Abstract:

Although drafting of the individual labor contract seems to be simple, especially due to the regulations of a "model framework", in reality, the approach may be subject to errors, as we will show, guiding their elimination. Our approach concerns only mandatory elements or clauses which are uncalled for the content of a „standard" individual labor contract of employment standard, stating that we aim for a simple procedurally look with generic examples and not to provide a real opinionated "model framework" of the individual labor contract (at least for now).

Keywords:

clauses which are uncalled, „standard" individual labor contract, "essential clause", de lege ferenda

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1. Introduction

Although drafting of the individual labor contract seems to be simple, especially due to the regulations of a "model framework",[2] in reality, the approach may be subject to errors, as we will show, guiding their elimination. Our approach concerns only mandatory elements or clauses which are *uncalled* for the content of a „standard"[3] individual labor contract of employment standard, and not those optional, in a position to truly inflict legal creativity. However, up to complex legal construction, we must ensure that we have clarified the basis of the content of such a contract, perhaps one of the most popular acts from the civil circuit.

As the obligation to conclude an individual labor contract rests upon the employer, lack of the mandatory elements-*called and uncalled*-may lead to different penalties on judicial or administrative control line or at least a few inconveniences from the employee's perspective who either could not answer in the absence of legal „instruments " legally solid, either could speculate the omissions or use them therefore normally do not allow" flipping " economic and legal dependence when the employer is in breach of the principle of mutual agreement and good will.

2. Source of possible errors and general procedural elements for removing them

Without denying completely the utility of a "model framework" (regulated) of the individual labor contract, it is still the main source for generating error in its correct drafting, although the situation seems paradoxical - in terms of legislative technique rigor we would expect, of course, to meet not only the requirements of the „standard" contract but also special ones. However, it is not considered the whole system of individual labor contracts and even though we relate only to the "standard" model "framework" (regulated) is insufficient to apprehend the mandatory elements or clauses; there is also a "difference" elements or clauses under the Labor Code[4], so you have do a "full inventory" at the same time taking into consideration the higher legal force of the code compared to the order. There are issues that we believe we have already enough, so that they are no longer a novelty, especially for practitioners, although we are still witnessing

[2] **See the Order of the Ministry of labor and** social solidarity no. 64/2003 approving the model framework of the individual labor contract (published in the Official Gazette of Romania, part I, no. 146 of 6 March 2003 subsequently amended).

[3] I took the ' standard 'attribute (M. Ioan, (2009), : 57).

[4] Law no. 53/2003-Labour Code (republished in the Official Gazette of Romania, part I, no. 345 of 18 May 2011, subsequently amended.

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the "ease" with which the admittedly less experienced and „specialized by the need" in labor law employers, are enchanted by the perfection[5] of the "framework" model in question. Also the "inventory" has to be carried out from the perspective of the system of those normative acts drawn up or negotiated by the employer (or, where applicable, by the social partners with the regulatory power, in the broad sense, of course, on it) and the system of acts of individual character of the labor law applicable at the level of the respective employer. Even with such solutions, the problem is solved only partially. Because if it is relatively easy[6] to capture the mandatory called elements or clauses, things are more complicated in respect of un-called ones from the perspective of these systems (see for details A. Ştefănescu, (2015), : 59-133).

It is what we would like to tackle next, stating that we aim for a simple procedurally look with generic examples and not to provide a real opinionated "model framework" of the individual labor contract (at least for now).

3. Elements or clauses which are uncalled but mandatory for the content of an individual labor contract

The requirement of such un-called elements or clauses for the content of the individual labor contract is based on the generic and complex disposal of art. 17 para. (1) of the Labor Code, according to which "prior to the conclusion or modification of the individual labor contract, the employer has the obligation to inform the person selected for the purpose of employment or, as the case may be, the employee, regarding the essential clauses which they intend to stipulate under the contract or to amend them. "

[5] Moreover, the issue of „making models" for the labor law legal acts (but not only) is a complex one and cannot be resolved, in fact, by what we find in the form of examples of "claim" to be "model"; indeed, the "model" should have the power of abstraction, of "covering" of a lot of aspects. See in this regard also art. 24 of Law no. 24/2000 concerning the rules of legislative technique for the preparation of normative acts (republished in the Official Gazette of Romania, part I, no. 260 from April 21, 2010, as amended subsequently).

[6] By way of example, to refer to the first category of elements or clauses, we recall that, compliant to the Code shall be stipulate, either by collective contract or by individual labor contract, or by the internal rules and regulations: rights and obligations of the parties that may exist for the duration of the suspension of the individual labor contract, excluding the performance and payment of rights of salary nature [art. 49 para. (3)] and the date on which the salary is paid [art. 166 para. (1)]. So these materials must be also stipulated under the content of one of the acts listed (only the act itself, can be chosen); in case of overlap or complement of a matter by several acts will be also taken into „consideration" the legal force of an act in relation to another one of the systems mentioned.

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But when are mandatory such "essential clause", especially since they are un-called from the perspective of the content of the contract? We can observe, the simplest, by thinking at the ones relating to the translation of "disciplinary law" from acts of statutory origin. Thus, in the absence[7] of any applicable internal regulation and/or collective labor contract, its specific rules should be detailed at least under the content of a decision, or[8] of an individual labor contract of employment. Otherwise, the employer cannot address the issue of disciplinary liability of the employee. Thus, a first group of these elements or essential clauses under the individual labor contract, considering the above, would be the one that is comprising disciplinary law, grouped around four legal "figures": disciplinary misbehavior, disciplinary sanctions, concrete rules regarding labor discipline in the unit, i.e. the rules related to the disciplinary proceedings.

A *second* important group of essential mandatory elements or clauses, for the same argument above, concerns the process of performance of the individual professional evaluation of the employees. Indeed, in a labor relation as a whole, we find that the professional evaluation of the employee is a particularly complex process, comprising (see A. Ștefănescu, Laura Georgescu, (2014) : 23, 25-27).

- *initial* professional evaluation through prior checking of the professional and personal capacities/skills of the persons applying for employment;
- continuous professional evaluation of each employee's considering the workload and, where appropriate, performance objectives to which have been assigned evaluation criteria for achieving them;

[7] But nothing can interfere with completing "disciplinary law" from the statutory normative acts or from the ones drawn up or negotiated by the employer (or, where applicable, by the social partners with the regulatory power in the broad sense, of course, over it), including by individual acts, such as the individual labor contract (indeed, in order to implement an act from the system of statutory normative acts, there must be an individual labor, because only through the latter incurs the legal individual labor relationship - this is the *terminus* points of the acts applicable to the labor relationship). The subjects in question can be "split" between the acts with regard to the legal force of the latter for the configuration of the first ones.

[8] Evidently, by proceeding to choosing the act expressing a disciplinary matter, the employer should make it clear that what has been established through negotiation cannot be "withdrawn" through negotiation (from the collective agreement/individual labor contract), in relation to the circumstances in which it would proceed to establish them unilaterally (through internal rules and regulations or by his decisions/orders).

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- periodical professional evaluation of each employee, according to the criteria and procedures for the professional evaluation of the employees established by the internal rules and regulations [9]);
- professional assessment *prior to the dismissal for professional discordance* "according to the evaluation procedure established by the applicable collective labor contract or, failing that, by the internal rules and regulations"[10] ((not be confused with the previous procedure, being distinct), which becomes the incident where deficiencies were noted regarding the compliance of an employee:
  - Ether ar the *continuous* professional evaluation,
  - Or at the *periodic* professional evaluation.

With the exception of the first matter which concerns the performance of the process of the individual professional evaluation of the employees-who can do, logically, the subject to a decision (and there is no individual labor contract), in the absence of an applicable collective labor contract or an internal rules and regulation-other (structured on types of evaluation) will materialize through the individual labor contract. Of course, the subjects in question can be "split" between the acts in the light of their legal force, of their action in time. Otherwise, the employer does not have appropriate legal instruments in order to put without risk the question of dismissal for professional discordance. Though the first two evaluations could be "omitted" (although we do not recommend that, from the perspective of risks), the last two are required by law, so compulsory.

Although it does not concern the present study, we point out however (for the complete listing of the above-mentioned categories of evaluations) that another that should be stipulated either under the applicable collective labor contract, or under the internal rules and regulations is the one which would apply to the individual or collective dismissal as per art. 65 from the Labor Code; indeed, as "dissolving the jobs does not concern positions or «unique» posts, but targets more jobs" occupied by workers who fulfil similar functions (crafts) (similar or even identical) should regulate the "selection" of the staff affected by the reduction"(see Ş. Beligrădeanu, (2006), : 127-128, in A. Țiclea, (2016) : 790).

A third group of essential mandatory elements for the content of an individual labor contract is the one that should be stipulated under the content of an internal rules and regulations as per art. 242 of the Labor Code, assuming that it has not been drawn up (keep in mind, of course,

[9] See art. 242 letter i) of the Labor Code.
[10] See art. 63 para. (2) of the Labor Code.

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other than the ones related to the "disciplinary law" or the process of the professional evaluation of the individual performance of employees to which we have already referred to). The idea is valid if the employer has chosen not to cover them into a decision, order [11] or has not "moved"[12] them into a collective labor contract.

Of the latter, special "dimensions" are given by the element *ways* of application of specific legal or contractual [13] agreements; not being stipulated under the internal rules and regulations, (as it should, after the normal order of the legislator, in accordance with article 242 letter h) of the Labor Code), or in collective labor contract or in the decisions, orders, they must be stipulated under the individual labor contract if the parties lies/it is expected that they would find themselves in the situations covered by those provisions -either at the time of negotiation of the contract or later (by addendum).

What would their nature be? As it is clear from their names, it would be the amount of the provisions similar to applicable norms (taken after the "pattern" of particularizing of applicable norms established by decisions or Government Ordinances).

What legal provisions would require such detailing? By way of example, we list:

- that of art. 46 para. (2) of the Labor Code stating "by way of exception, the period of the deployment may be extended for objective reasons requiring the presence of the employee to the employer where the deployment was done, by mutual agreement, every 6 months" where the need to detail some of those reasons (it may be considered, by comparison, the law applicable to civil servants which provides that such "details");
- that of art. 46 para. (3) of the Labor Code stating that "the employee may refuse the deployment ordered by his employer only exceptionally and for personal reasons", which would result in the necessity to detail the exceptions and the reasons of such value;

[11] His interest (of course, naturally) would be that he would establish by these unilateral acts and not by negotiation.

[12] "In practice, quite often, internal rules and regulation shall align (are negotiated) with the labor union or with the representatives of the employees, (sometimes even being one of the addenda to the collective labor contract). The negotiation of that regulation is possible; employer could approve it only by the consultation of the union or representatives of the employees-waives that right and, in the interests of a more adequate climate in its collective, he aligns with the syndicate. " (I.T. Ştefănescu, (2014): 61-62).

[13] As regards the specific contractual provisions, it will be taken into consideration the applicable collective labor contract.

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- provisions of social security agreements governing, in the addition to the Labor code, other categories of medical leave and leave for child care (but not only);
- provisions governing individual dismissal according to art. 65 from the Labor code, particularly (collective dismissal reputing a quite complex procedure which is already regulated), one being able to consider (not being mandatory) *analogy* with special regulations of collective dismissal (see for details A. Ștefănescu, L. Georgescu, S.G. Stroe, (2016), : 15-26)

De lege ferenda

Of course, examples can continue and be expanded depending upon the complexity of the essential elements or clauses given the circumstances- i.e. when they acquire the value of un-called mandatory elements or clauses of the individual labor contract. The idea is that it unequivocally, individual labor contract, appears to be such a particularly complex act and relevant aspects (including this study) should be, *de lege ferenda*, precisely introduced or mentioned, even generically, in the Order of the Ministry of Labor and social solidarity no. 64/2003 approving the model framework of the individual labor contract.

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