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NULLITY OF SOME ESSENTIAL CLAUSES (WAGE) OF THE INDIVIDUAL EMPLOYMENT CONTRACT. WAYS OF RESOLUTION. EFFECTS

Gheorghe MOROIANU[1]

Abstract:

While in the private sector, as regards the amount of the wage, the only requirement is the payment of the guaranteed minimum gross wage, and a maximum limit is not imposed, in the public sector (where remuneration is set by law, and a wage negotiation between the contracting parties is not possible), the failure to comply with the terms of the law involves the mandatory replacement of the established clauses with the break of the law on remuneration, considering art.57, para. 4 of the Labour Code, according to the procedure settled in the Labour Code in art. 57, para. 6 and 7. Consequently, regaining legality cannot be done through the unilateral modification of the individual employment contract, but through the procedure stipulated in art. 57, para. 4, 6 and 7 of the Labour Code, relating to "nullity".

Keywords:

nullity; modification; individual employment contract; wage; remuneration.

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The problems regarding the legal and political reforms in the context of sustainable development aim also to the labour relations, whose form of expression, the most numerous, is to be found in the existence of the individual employment contracts. The reform in the field of labour relations and the need for legal security, although they would seem two contradictory concepts, are not in dispute, but in time their interrelation has been shown. Consequently, what at one time seemed to satisfy a particular labour policy, later, due to economic and social changes, both at the local, national, and global level, proved to be a brake on development, and the need for reform and for new legal regulations was revealed. Over the time (Ştefănescu I. T. (2014):224-228), the individual employment contract has been defined (Alexandru Ţiclea(2011) :331) as that convention through which a person commits to make his work available to another (natural or legal person), to whom he/she is subordinated, in exchange for a remuneration (wage).Thus, from the above definition, it can be noticed that in terms of traits that characterize it, the individual employment contract involves the carrying out of physical or intellectual work, the employee's subordination to the employer, and a wage (labour remuneration). As concerns the wage[2], this represents an essential element of the individual employment contract. If this misses at the date of the contract conclusion, the contract is almost null, especially if this clause is not covered in the future. While in the private system, as concerns remuneration, the main sources of law are the Labour Code art.159-172 and the collective bargaining agreements, in the public sector the norms that relate to this issue are included in art.159-172 of the Labour Code, framework law no.284/2010 as regards remuneration with the amendments in 2011-2016, Law No.63/2011 (regarding the employment and the remuneration of the staff in the education field), and certain acts concerning the remuneration remaining in force (after the entry into force of Law no.284/2010). Definitely, both sectors (public and private) apply the government decisions regarding the establishment of the minimum guaranteed gross wage gross minimum, which, starting with May 2016 is 1,250 lei. While in the private sector, as concerns the amount of wage, the only requirement is the payment of the minimum gross wage guaranteed as payment, and there is not a maximum limit, in the public sector (in which remuneration is established by law and wage negotiation between the parties

[2] Terminologically, the European, international and national norms use the terms of remuneration, salary, indemnity (the remuneration of magistrates and officials). Yet, according to the decisions of the Court of Justice of the European Union, remuneration means the salary or the ordinary payment – basic or minimum – or any other benefit paid directly or indirectly, in cash or in kind, by the employer, as a result of employing the worker.

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of the contract is not possible), the non-compliance with the terms of law triggers mandatorily the replacement of the established clauses with the break of the law regarding remuneration, considering art.57 para.4 of the Labour Code, according to the procedure settled in the Labour Code, art.57 para. 6 and 7. Such inconsistencies of payment within the law were found by the Court of Accounts of Romania in different institutions and public authorities, in some cases, even for the entire contractual personnel. At the control it was requested to regain legality in the sense of harmonizing the clause of the amount of wage stipulated in individual employment contract with that arising from the normative act. The solution chosen by employers to become legal was to issue a decision of unilateral modification of the individual employment contracts as regards the "wage" clause, accompanied simultaneously by an addendum to the employment contract, which the employers the employees to sign, but they did not agree. A part of the employees preferred bringing an action in court against those decisions within the framework of labour disputes, the central issue being whether the employer can unilaterally alter an essential element of the individual employment contract, respectively wage. In the case is invoked the fact that during the control, the Court of Accounts, noticing the nullity of a clause contained in the individual employment contracts, by the request to regain legality, did not ask for the unilateral modification of wages, but for the compliance with the legal provisions regarding remuneration. The regaining of legality could not be done by the unilateral modification of the individual employment contract, but by the procedure stipulated in art.57, para.4, 6 and 7 in the Labour Code, referring to "nullity". Thus, para. 4 of art.57 in the Labour Code stipulates that:"(4) Should a clause be affected by nullity, for having established rights or obligations for the employees contrary to mandatory statutory provisions or applicable collective labour agreements, it shall be replaced de jure with the statutory provisions or the provisions of the collective agreement, and the employee shall have the right to indemnification."

Hence, the text of law uses the expression "it shall be replaced" and not "it shall be modified".

As regards "the establishment of the nullity and, according to the law, of its effects", this may be done "by agreement of the parties", an express text stipulated in art 57 para. 6 in the Labour Code, and "should the parties fail to agree, the nullity shall be pronounced in court" (art 57 para. 7 in the Labour Code). Moreover, the employer's reasons for the decision did not mention any basis of law, so that this formal reason alone (but necessarily required by law), was, according to employees, enough for the decision annulment. Furthermore, this circumstance (the lack of mentioning

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the legal grounds) could not be covered by any employer's subsequent act which he could rely on during the trial; the court was held in judging such cases, to examine with priority the claimed legal grounds. As shown, this was missing in the statement of reasons. At the same time, besides the above mentioned issues, it was also stated that in terms of nullity in labour law, it is known that the effects are only for the future, but in this analysis can intervene also aspects regarding the employee's right to indemnification (art. 57, para. 4 final part in the Labour Code). However, to the extent that the wage clause established in the contested decisions (as an essential element of the individual employment contract and categorically taken into account at the conclusion of the employment contract) would not have been accepted by the employee, obviously the contract could not have been concluded, so that, on such grounds, in resolving the nullity found by the Court of Acounts, the regaining of legality could have taken place either by obtaining the agreement of lawful replacement of the wage clause, as stipulated by law or by termination of employment relations as a consequence of the lack of agreement regarding the wage, in compliance of the principle of labour freedom. As outlined in the doctrine, (Ion Traian. Stefanescu (2014) :383) "the modification of the individual employment contract involves meeting the conditions required by law, truth stemming from the rule of labour stability. The regulation of the modification of the individual employment contract is based on the following rules:- the binding force of the contract between the parties ("the valid contract has the force of law between the contracting parties" – art. 1270 para. 1 Civil Code, the contract is modified or terminated only by the agreement of the parties or for reasons authorized by law – art.1270 para. 2) - the protection of the employees (art. 41 para. 2 in the Constitution)."

It is obvious that the law-maker has regulated these issues not for imposing only the unilateral will of the employer, but adopted clearly a procedure which enabled the parties of the individual employment contract to agree, and when consent is not reached, only the court has the power to decide, but at the claimant's referral (i.e., the employer). This did not happen in the above mentioned case; the unilateral modification was used, which is wrong in relation to the express provisions of the law. Judging such labour disputes, some courts[3] decided to reject the appeal as unfounded, and the argument was that: - "the modifications of the claimant's wage were based on the findings contained in the financial audit report no…. of 15.04.2015 and the measures contained in the decision ... of the Court of Accounts of

[3]Bucharest Tribunal – Section VIII, labour conflicts and social insurances, case no.28194/3/2015, civil decision no.902/28.01.2016, unpublished case.

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Romania filed ... ", that the employer is a public institution financed entirely from its own incomes, with legal personality, and as the remuneration of its personnel is done in accordance with the framework law no. 284/2010, concluded that, according to art.138 para. 3 of Law no. 62/2011 on social dialogue, "the remuneration rights in the public sector are established by law in specific limits, and cannot be the object of negotiations and cannot be changed through collective labour agreements," so that also in this case "the unilateral modification is legal ... and the employee's agreement is not necessary, the provisions of art. 41 in the Labour Code not being applicable."

The motivation also specifies that, although "according to art. 17 para.5 in the Labour Code, any modification of one of the elements in art. 17 para.3 in the Labour Code (including wage and position) during the individual employment contract requires the conclusion of an additional agreement to the contract," as regards the fact that the modification made by employer would result from the law (and not from the request the Court of Accounts, as a consequence of the control, and it is motivated in the decision), such an agreement is no longer necessary as the modification results from the law. It has also been shown that in the case the provisions of art. 41 of the Labour Code were not broken, on the grounds that these provisions are not applicable in this case.Other judicial panels of the same court, referred with the same kind of cases, decided:[4] "Being referred only the analysis of the validity of the modification of the individual employment contract, and not the legality of establishing the amount of wage to which the claimant is entitled, the court finds that the procedure followed by the employer in order to enforce the obligations of becoming legal in terms of the remuneration its staff, is not the one permitted by the law ...

The argument of the defendant, based on the latter legal text, in the sense that in the case of claimant, who is part of the staff of public institutions for which the payment system is regulated by law, the will agreement was not necessary for complying with the legal norms on remuneration, the agreement required the above mentioned legal provisions, in the case of wage modification, does not stand to the analysis as art.162 para.2 and 3 stipulate the exceptional modality for establishing the salaries of the staff of the authorities and public institutions, its negotiation could be done only within the remuneration law. The text referred only to the condition that had to be fulfilled when concluding the parties' agreement on the amount of wage, while the modification, annulment of the individual

[4] The civil decision no.388/14.01.2016 pronounced in the case 28191/3/2015 of Bucharest Tribunal – Section VIII, labour conflicts and social insurances.

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employment contract, respectively of one of its clauses are different institutions, regulated separately, by specific rules. Thus, the different regime of establishing the wages of this category of staff does not imply the exemption from the other legal rules regarding the conclusion, modification or annulment of the individual employment contract, of clauses thereof, in the absence of express legal provisions in this regard. The defendant's act was not issued for the enforcement of legal provisions subsequent to the signing of the individual employment contract – normative act meant to stipulate the modification of the legal regime of the institution, the modification of the status of its staff or changes of the wage regime, in which case the employer could legally issue acts for the implementation of new regulatory provisions, inclusively to modify the employee's wages, with their possibility to challenge them, according to the legislation in question –, and the Law no.284/2010 invoked as basis for determining the new wage, was in force at the date of the conclusion of the individual employment contract, but there is evidence that it was not applied. In this situation, the issue is that there is a mismatch between the wage clause of the individual employment contract and the legal provisions that were in force when the agreement was concluded, and become applicable the provisions of art. 57 of the Labour Code, which regulate the nullity of the individual employment contract that intervenes in the event of non-compliance with any of the legal conditions necessary for its valid conclusion (para. 1), and the nullity of a clause in the individual employment contract on the grounds that establishes rights and obligations for employees, in conflict to some mandatory legal norms (para. 4).As the clause regarding the wage of ... was included in the individual employment contract between claimant and defendant, and the wage represents an important element upon which the expression of the parties' will agreement depends, even if for the staff employed in the public institutions the negotiation, in terms of the amount, is limited by law, in the case when the wage value does not comply with the normative act, this situation cannot be eliminated by the unilateral modification derived from the employer, as the provisions of 41 of the Labour Code prohibit this, but by noting the nullity of the wage clause, which according to art.57, para. 6 and 7 of the Labour Code occurred only if there is an agreement of the contracting parties in this respect or, failing an agreement of the parties, as a result of the court's findings. Therefore, considering that the contested decision had as effect the unilateral modification of the individual employment contract, without the agreement of the employee, and that the act of reducing the claimant's wage has not arisen as a consequence of the implementation of a legislative modification subsequent to the conclusion of the individual employment contract (circumstance that could have justified

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legally the employer's act), but was issued to remove a possible violation of the normative act that was in force at the date of the agreement of the parties of the individual employment contract, more precisely to remove a cause of nullity of clause; or he could not do this without the employee's agreement, respectively without a confirmation of nullity in court, in which case, according to art.57 para.3, 6 and 7 of the Labour Code, following the finding of nullity, the clause would have been replaced with the applicable legal provisions, the court finds that the defendant's act is null. "(our emphasis). From our point of view, the above reasoning is legal, as it described exactly the law issue under trial. There were sound explanations of what means a unilateral modification required by law (and under what circumstances it can be done) and why a different procedure should be applied, i.e. the one relating to nullity. It has been clearly demonstrated that the unilateral modification of wage could be done only if it was the result of a normative act issued after the conclusion of the individual employment contract (either with a decrease or an increase, as happened recently when the wages in the public sector were raised), and not as a result of an agreement on the occasion of the conclusion of the individual employment contract.

Bibliography

I.T., Ştefănescu.(2014), *Tratat teoretic şi practic de drept al muncii (Theoretical and Practical Treatise of Labour Law).* Third edition, revised and added. Bucharest: Universul juridic Publishing House.

Al., Ţiclea.(2011), *Tratat de dreptul muncii (Treatise of Labour Law).* Fifth edition, revised. Bucharest: Universul juridic Publishing House.

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