PUBLIC ADMINISTRATION IN A EUROPEAN CONTEXT. CASE STUDY: POSSIBILITIES TO COMPLETE THE TRIAL PERIOD – PRACTICE AT NATIONAL LEVEL *VERSUS* PRACTICE OF THE EUROPEAN UNION CIVIL SERVICE TRIBUNAL

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Abstract

As social policy is outlined and its objectives stated in the provisions of Article 151 of the Treaty on the Functioning of the European Union, both the Union and the member states must be responsible for respecting "fundamental social rights such as those stated in the European Social Charter signed in Turin on 18 October 1961 and in the Community Charter of Fundamental Social Rights of Workers adopted in 1989". In the light of these goals, we are concerned with an analysis aimed at a legal and fair promotion and harmonization of the procedure for filling positions at the public administration level, with an emphasis on the protection of social rights and the harmonization of good practices developed, in conditions of honest social protection and combating exclusion and discrimination of any kind. It is therefore necessary, at a theoretical level, to take it for granted that the Union and all its member states implement practices aimed at favoring the harmonization of social systems. Concretely, however, we find that the applied procedures neglect the approximation of the issued administrative documents and any kind of common methodology, as long as a report is not regulated or applied at the national level that reproduces the conclusions of the verification of the professional skills of the employee at the end of the trial period. We propose in this article a substantiated analysis of the methods of termination of trial periods, so that the termination of employment contracts concluded during the trial period exclusively through a written notification, without notice and without any motivation, is no longer the concern of the courts, because the court cannot verify the existence or not of the professional aptitude in the absence of the presentation of some arguments by the employer that aim to fulfill or not within reasonable terms the assigned duties, certain difficulties in the service relationship or the degree of accommodation with the administrative and hierarchical system.

Keywords: *professional skills, trial period, report at the end of the trial period.*

JEL Classification: K23, K33

1. Trial period – legal treatment at national level

According to the Labor Code, prior to the moment when the employee signs an individual employment contract, he must be informed by the employer about the duration of the trial period, but without denying that this procedure should also consist of an effective enumeration of "sought after" skills. However, this aspect is not encountered in current practice, and our documentation proved that the definition of the skills related to such a job is not identified and therefore not known even by the representatives of the employers who carry out the information of the future probationary employee. As such, you certainly cannot be properly informed before entering a trial period, without knowing the skills on the basis of which you will be evaluated during or at the end of it. Moreover, as an employee, you cannot continuously[3] improve yourself if you do not know the segment to which you need to make a correction, and this is even more so since the provisions of article 192 para. (1) of the Labor Code enshrines as the main objective of professional training "the adaptation of the employee to the requirements of the position or workplace". From the respective moment of signing the contract, the future employee, eager only to conclude the employment contract, is automatically placed in a position of disadvantage, a position that is really strengthened when the employment relationship concluded under these conditions, is notified without reason but with a targeted purpose concluded

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[3] See Order no. 64 of February 28, 2003 for the approval of the framework model of the individual employment contract, respectively the provisions of the Labor Code that regulate the right of access to professional training, to the updating of knowledge and skills specific to the position and workplace and the improvement of professional training for the basic occupation (articles 39, 192).

in the idea that the professional skills of the employee are inadequate in relation to the job requirements.

Following the expressed will of the national legislator (art. 31 para. 1 of the Labor Code), precisely for the purpose of concluding on the existence or not of the professional skills of the employee, the trial period of up to 90 or 120 calendar days was established, the distinction being made between executive and management functions (the exception is for disabled persons for whom the trial period is up to 30 calendar days).

Thus, if the trial period has been established for a specific purpose, namely to check certain skills, it is appropriate that these be defined and expressly brought to the knowledge of the employee at the time of prior information to the signing of the employment contract. We appreciate that only in this way can they be fully aware as evidence of standardized professional skills in correlation with the environment of exercising a certain professional qualification, which would ultimately outline an honest assessment of the employee's ability to exercise the regulated profession in question. Moreover, the written notification, unmotivated, without notice[4] can be the subject of a question from the former employee based on the provisions of the Regulation on the protection of natural persons with regard to the processing of personal data, as long as this document is determined in issuing elements that define the person directly or indirectly[5]. So, to the natural question "what are those defining elements of the person corresponding to the position?", what can be answered?

Since the case study addressed is placed as part of the area of public administration in a European context, we consider it necessary to clarify that we have analyzed the provisions of the Labor Code and not the Administrative Code, based on the status of the categories of budgetary personnel to whom the provisions do not apply regarding civil servants[6], categories that include contractual staff from public authorities/institutions in charge of administrative activities, staff from health units or autonomous governments or national companies and societies, without the enumeration being limiting. Precisely on the basis of this aspect, I considered that it is necessary that the researched problem should be nuanced in relation to the issue determined at the level of the courts, aligned with the practice at the European level and emphasized at the level of the national legislator, the structure of the research being completed precisely for this reason through *de lege ferenda* proposal.

2. The inconsistency of national jurisprudence

The reality of the factual situation described above becomes all the more difficult to manage from the level of the courts.

It is a relevant approach to rigorously analyze from the level of a panel of judges the factual and legal reasons contained in a dismissal decision. Thus, once invested with the resolution of a dismissal determined by a simple written notification, without reasons regarding the termination of the employment relationship, the panel is automatically in the position of an impossibility of verifying the basis that actually determined the dismissal at the end of the trial period or during this one. Therefore, there is a beach of interpretation favorable to opposite solutions pronounced in similar cases, precisely because the legislator did not "dictate" a reasoned form of the notification and no preparation methodology.

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[4] Topic reference extract from the Labor Code - Law no. 53 of January 24, 2003 republished in the Official Gazette with number 345 of May 18, 2011; "Art. 31 (3) During or at the end of the trial period, the individual employment contract can be terminated exclusively through a written notification, without notice, at the initiative of any of the parties, without the need to give reasons."

[5] Extract of theme interest from Regulation no. 679/2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data - Published in the Official Journal with number 119L of May 4, 2016: "The principles of data protection should apply to any information regarding to an identified or identifiable natural person …. In order to determine whether a natural person is identifiable, consideration should be given to all means, such as individuation, which either the controller or another person is reasonably likely to use for the purpose of the identification, directly or indirectly, of the respective natural person."

[6] We exemplify the staff from C.N.A.I.R. - Regional Directorates of Roads and Bridges; see for research and in compliance with the incidental provisions of EU Regulation no. 679/2016 regarding the protection of natural persons with regard to the processing of personal data - File no. 3672/108/2021-The Court of Arad.

As a consequence, the absence of motivation determines the reality according to which the court, not having the possibility of applying the principle of truth and the active role of the judge, not knowing the skills predetermined in the evaluation of the employee, may unintentionally open the way to unfair dismissals, to the abuse of law , emptying the essence of the rationale of the trial period and indirectly contributing to the violation of a basic principle that manages labor relations, namely, that of stability. At a theoretical level, the court has opened the way to the fact that the burden of proof rests with the employer, and precisely for this reason, an employer willing to respect the law and the rights of its employees, must be able to submit by correspondence with the provisions of article 272 of the Labor Code, up to the first day of appearance, the edifying evidence regarding the skills of the employee for the position in question. This, however, would involve additional diligence, instituted with a preventive nature from the very moment of prior information, reflected in the internal procedures and corroborated with the attributions of each position.

The practice encountered at the level of the courts is inconsistent, and this conclusion, always referred to by the European Court of Human Rights, demonstrates a constant violation of the principle of legal security but also of the right to a fair trial. The research undertaken, however, demonstrates a different way of approaching the courts, some limiting themselves strictly to the right of the employer to give in writing and without indicating any reason the will to terminate the employment contract on the basis of art. 31 paragraph 3 of the Labor Code, namely, finding that the elements indicated by the legislator are fulfilled and thus there is no reason for nullity. Other courts, however, request using all the principles that govern the civil process and through their prism and the provisions of art. 272 of the Labor Code, the provision of edifying evidence regarding the professional misconduct of the employee, trying to find out the truth and identify a possible counter argument, and in this sense we quote from the practice of the Bucharest Court of Appeal: "The Court finds that "the defendant employer did not provide any conclusive evidence or any relevant defense in this regard, in the sense of invoking and proving a professional misconduct of the employee and, even if art. 31 of the Labor Code does not require a prior evaluation of the employee, professional misconduct is the only ground that can substantiate the manifestation of the employer's intention to terminate the employment relationship during the trial period."[7]

3. Practice of the Civil Service Tribunal of the European Union

The Civil Service Tribunal, abolished in September 2016, accumulated during its existence a practice "to be remembered" both for the courts and equally to be invoked by the litigants and learned by the institutions. "Jurisprudence is the knowledge of divine and human things, the science of what is just and unjust" says Domitus Ulpian, a well-known Roman jurist, whose work is remarkable for its accessible and extensive way on legal practice. Court decisions help to interpret the law, they can be a source of citation and sometimes they can even outline legal norms.

Having jurisdiction over the litigation of the European civil service, the Civil Service Tribunal was registered with disputes that concerned an issue in the area of labor relations and the social security segment. The vast majority of the decisions handed down were aimed at resolving disputes related to special categories of personnel, employees of Europol, the European Union Office for Intellectual Property, the European Central Bank, etc.

In the context of this material, our attention is directed to the decision of this court pronounced in case F-52/05[8], case in which the plaintiff (previously an administrative judge in Sweden), was appointed, during the probationary period, as an official at the "European civil service; status and discipline" in the coordination of the structure "Rights and obligations; policy and social actions" of the General Directorate (DG) "Personnel and Administration" of the Commission. At the end of the

[7] The document is available online at: http://www.rolii.ro/hotarari/60d3e468e49009f8170000a2 - Bucharest Court of Appeal, VIIth Section for cases regarding labor conflicts and social insurance - public hearing on 10.05.2021 (consulted on 1.06.2022).

[8] The document is available online at: https://curia.europa.eu/juris/document/document_print.jsf;jsessionid=5B5AF48D1F637A38FF413BE5E6B94EC9?docid=76049&text=&dir=&doclang=RO&part=1&occ=first&mode=DOC&pageIndex=0&cid=4292048 (consulted on 1.06.2022).

probationary period, the manager, following consultation with the employee's superior, proceeded to draw up a final report of the probationary period, in which it was noted that the plaintiff "could not fulfill, within reasonable terms and, in one case, at all, certain important duties that had been entrusted to him", that there had been "certain difficulties in service relations" respectively a "lack of familiarity with the administrative and hierarchical system in force within the Commission". Regarding the procedure itself, but especially from the whole of the decision and its considerations, we find an organization of the trial period that must be well structured, with respect for the rights of the employee/employees, from the part of information on non-conformities to the part of offering the possibility of correcting or even extending the internship by assigning it to another structure. The Civil Service Tribunal holds that the applicant justifiably criticizes the Commission for extending the probationary period without any prior warning being addressed to her. Thus, it is emphasized: "while it is true that there was no obligation for the administration to issue, at any time, a warning to the probationer whose performance is unsatisfactory, it is nevertheless important to emphasize that in its report of the administrative investigation, the auditor councilor expressed his regret regarding the circumstances that were the basis for drawing up the first final report of the trial period and denounced in particular, as contrary to the duty of diligence, the fact that the applicant had not had the possibility neither to give timely explanations regarding the weak points highlighted by his head of unit, nor, above all, to fix them, establishing, together with his hierarchical superiors, the necessary means".

4. Proposals *de lege ferenda*

The proposal *de lege ferenda* reflects the vision regarding the regulation of the trial period within the Labor Code in a manner in which in art. 31 of the Labor Code to maintain the nature of a termination clause, but with the indication of the reason for professional inadequacy by reference to the criteria or indicators previously communicated to the employee, before the conclusion of the individual employment contract. At the same time, we consider it appropriate to communicate the notification only after the prior assessment of the employee, according to the procedure established by the applicable collective labor agreement or, in its absence, by the internal regulation, and this all the more since article 29 paragraph (1) states: "The individual employment contract is concluded after the prior verification of the professional and personal skills of the person applying for employment".

In fact, the question is whether or not the current regulation is satisfactory in correspondence with all the incident legislation, and especially if some changes and additions are needed to strengthen its legal regime. According to our opinion, the answer is an affirmative one, determined by the arguments derived from the content of this paper.

The concrete formula that we propose, transposed into practice, would have the following content:

"Art. 31. (1) To check the skills of the employee, at the conclusion of the individual employment contract, a trial period of no more than 90 calendar days can be established for execution functions and no more than 120 calendar days for management functions.

(2) The verification of the professional skills for hiring persons with disabilities is carried out exclusively by means of a trial period of a maximum of 30 calendar days.

(2^1) Professional inadequacy as the sole reason for terminating the employment relationship during the trial period, is identified as a result of the score obtained by completing the general grid for evaluating the employee's skills, an integral part of the pre-employment information.

(2^2) The skills of the employee verified at the end or during the probationary period are distinct from those provided for in article 29 para. 1), and aims at least: the communication skills within the work environment, the capacity for analysis, synthesis, strategy and planning, experience at the application level, skills for managing crisis situations at the level of the structure.

(3) During or at the end of the trial period, the individual employment contract may be terminated exclusively, without notice, by means of a written notification accompanied by the skills assessment grid as evidence of professional misconduct, or a change of workplace may be proposed depending on the score obtained for the indicators in the grid.

(3[1]) In the case of the proposal to change the place of work, it can be changed unilaterally by the employer either by running a new trial period or only for the remaining period in the situation where the evaluation took place during it."

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