

PROBATION PERIOD IN THE INDIVIDUAL LABOR CONTRACT. THEORETICAL AND PRACTICAL ASPECTS

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ABSTRACT: *To check the skills of the employee, at the conclusion of the individual employment contract for an indefinite period, a probation period of no more than 90 calendar days may be established for the execution functions and no more than 120 calendar days for management positions.*

The probation period is, as a rule, optional, in the individual employment contract and is stipulated in the form of a contract clause.

There are a number of important advantages in this way of checking the skills of the employee, which is why in practice it is frequently used by the parties of the individual employment contract.

This study aims to analyse this specific clause of the individual employment contract and its impact on both sides of the individual employment contract, as well as the controversial aspects of judicial practice regarding the probation period.

Keywords: *the probation period; individual employment contract; written notice; Labor Code; specific clause.*

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1. THE PROBATION PERIOD. LEGAL FRAMEWORK.

The probation period is regulated by art. 31- art.33 of the Law no. 53/2003 on the Labor Code¹.

Art. 31 of the Labor Code defines the probation period as the period established at the conclusion of the individual labor contract for checking the skills of the employee. The legal text underlines the optional nature of the period as a means of verifying the employee's skills.

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It is also necessary to establish the probation period in the individual employment contract, being also subject to the information obligation regulated by article 17, paragraph 2, lit. n of the Labor Code.

Therefore, the probation period is a contractual stipulation that can be negotiated and included by the parties in the individual employment contract, by virtue of the principle of freedom of contract, enshrined in art. 1169 C. civ.

Although there is no legal definition of probation period, certain features may be emphasized.

Thus, an essential aspect of the probation period is the fact that during or at the end of the probation period, the individual employment contract may be terminated exclusively by written notice, on the initiative of either party, without the need to motivate it.

Another aspect concerns the establishment of a maximum duration of the regulated probation period.

Also, according to article 31 paragraph 4 of the Labor Code, the person who is subject to the probation period will benefit from all the rights and obligations applicable to any employee and established in the labor legislation, in the applicable collective labour agreement, in the internal regulation, as well as in the individual employment contract.

2. THE PROBATION PERIOD. CLAUSE OF THE INDIVIDUAL EMPLOYMENT CONTRACT

If the parties to the individual employment contract have negotiated on the insertion of a probation period, it is mandatory to be included in the very content of this contract, on the date of its conclusion.

Even if, at first glance, it could be assessed that the employer is taking greater advantage of the inclusion of a clause relating to the probation period, it cannot be excluded that, in certain situations, the employee also has the interest to negotiate the inclusion of such a clause.

Thus, due to the advantages presented by the probation period, namely the possibility of termination of the contract without observing a notice period, and an employee may have interest in including such a clause in the contract. It is not possible to include the probation period in the content of an addendum to the individual employment contract, as is clear from the content of article 32, paragraph 2 of the Labor Code.

Even if the individual employment contract was affected by a suspensory term, it would not be possible to stipulate a later clause relating to the probation period.

As regards the legal nature of the probation period clause, it does not convert the individual employment contract into a fixed-term contract. It is also not a resolutive condition², such a clause being otherwise incompatible with the nature of the individual employment contract.

Therefore, we can characterize the probation period as a specific clause of the individual labor contract, having an optional character. By exception, the probation period

² Potrivit art. 1401, alin. 1 din Codul civil, *Condiția este rezolutorie atunci când îndeplinirea ei determină desființarea obligației*. De asemenea alin.2 prevede că, *Până la proba contrară, condiția se prezumă a fi rezolutorie ori de câte ori scadența obligațiilor principale precedă momentul la care condiția s-ar putea îndeplini*.

is binding in the cases provided for in article 31, paragraph 2 of the Labor Code, respectively "the verification of professional skills when employing disabled persons is carried out exclusively by means of the probation period of maximum 30 calendar days."

It was appreciated in the doctrine (Țiclea, 2023) that the probation period is a clause of notice or desistation because it consists in the dissolution of the individual labor contract by the unilateral will of one of its parties.

In the same sense, in the judicial practice³ it was noted that the probation period represents a clause of notice (of denunciation, of desistation) of the employment contract. The probation period is a simplified way of termination of the employment contract, advantageous, based on the principle of legal symmetry, for both parties. The solution is justified by the precariousness of such a contract; it is not consolidated until after the probation period expires and only if the employee professionally corresponds to the position in which he is employed or if he is satisfied with that position and wants to continue the activity.

Also, by the Decision of the Constitutional Court no. 334/2012⁴ on the exception of unconstitutionality of the provisions of article 31, alin. 3 of the Labor Code it is shown that "the legal regime applicable to employment relationships during the probation period was expressly regulated by the legislator as being a special one compared to those for which no such period is established. Therefore, in order to verify the professional skills of the employee, the legislator also introduced a special condition, applicable to the employment relationship thus concluded, namely the notification provided for in article 31, paragraph 3 of the Labor Code, a notification that should not be motivated and that is equivalent to the fact that the professional skills of the employee do not meet the job requirements. It is a discretionary decision taken by the employer, having a position that includes making such a decision. Moreover, the criticized contractual clause encourages the continuous professional improvement of the employees, being agreed by both parties at the conclusion of the contract."

No justification for the notification is required. If the employer choose, however, for denouncing the contract, it was considered that (Sasu , 2009) it may be even unfavorable to him, because the disgruntled employee can "demonstrate" the reasons before the court, trying to prove that the renunciation of the contract by the employer is abusive.

For our part, we consider that, also if the notification contained the considerations for which the contract is intended to be terminated, to the extent that the intention of the party is unequivocal and the legal requirements provided by article 31, paragraph 3 of the Labor Code are met, termination of the contract during the probation period is legal.

Also, the probation period is characterized by uniqueness. Thus, according to article 32, paragraph 1 of the Labor Code, during the execution of an individual labor contract, only one probation period can be established. By exception, according to paragraph 2, the employee may be subjected to a new probation period if he starts with the same employer in a new position or profession or is going to work in a job with difficult, harmful or dangerous conditions.

³ Decizia Curții de Apel București nr. 2194/2019.

⁴ Publicată în Monitorul Oficial nr. 358/2012.

It shall be prohibited to establish a new probation period if, within 12 months, between the same parties a new individual employment contract is concluded for the same function and with the same attributions. The legal provision is likely to protect the employee.

At the same time, the probation period is seniority in work and takes effect from the first day when the employee begins to perform the activity within the individual employment contract.

3.DURATION OF THE PROBATION PERIOD

The length of the probation period is different, related to the type of employment contract but also to the position occupied by the employee.

In the case of individual employment contract of indefinite duration, a probation period of no more than 90 calendar days may be established for the execution functions and no more than 120 calendar days for management positions. In this respect is art. 31, paragraph 1 of the Labor Code.

Regarding the individual fixed-term employment contract, the probation period, according to article 85 of the Labor Code is of maximum:

- 5 working days for an individual employment contract duration of less than 3 months;
- 15 working days for a duration of the individual employment contract between 3 and 6 months;
- 30 working days for an individual employment contract duration exceeding 6 months;
- 45 working days in the case of employees in management positions, for an individual employment contract duration exceeding 6 months.

According to article 97 of the Labor Code, the temporary employment contract may establish a probation period for carrying out the mission, the duration of which may not be longer than:

- two working days if the temporary employment contract is concluded for a period of less than or equal to one month;
- 5 working days, if the temporary employment contract is concluded for a period between one month and 3 months;
- 15 working days, if the temporary employment contract is concluded for a period between 3 and 6 months;
- 20 working days, if the temporary employment contract is concluded for a period of more than 6 months;
- 30 working days, in the case of employees in management positions, for a temporary employment contract duration exceeding 6 months.

From the analysis of these legal provisions, it follows that there is a difference between the way of determining the probation period in the indefinite-term contract and the fixed-term contract, respectively the temporary employment contract, the first setting the duration by calendar days and the other two by working days.

4. THE USEFULNESS OF THE PROBATION PERIOD

The probation period is useful for both parties.

Thus, from the employer's perspective, it has the possibility to check it additionally on the employee, that is, how it performs its assigned tasks and how it can be integrated into the employer collective.

Regarding the employee, he can also check whether the job meets his expectations and can be integrated into the employer's collective.

From this point of view, the probation period is a very effective way of checking the skills of the employee.

5. PROCEDURE FOR THE TERMINATION OF THE INDIVIDUAL EMPLOYMENT CONTRACT DURING THE PROBATION PERIOD

According to the provisions of article 31, paragraph 3 of the Labor Code, during or at the end of the probation period, the individual employment contract may be terminated exclusively by written notice, on the initiative of either party, without the need to motivate it.

From the analysis of the legal text, it follows that the notification issued by the interested party may intervene in the probation period at any time, for example, in the 90 days or 120 calendar days, namely, on any day of this interval. In the interpretation of the legal text, the doctrine (Țiclea, 2023) argued that, if the last day is a non-working day, it would be appropriate that the notification should take place no later than the last working day of that period.

As regards the manner of manifestation of the will of the parties in respect of the termination of the contract, even if the legislator uses the name of the notification, it is permissible for the employer to express his will in this regard and by a decision.

As has been pointed out in the legal literature (Marcu-Siman, 2022) even if an improper name (decision of individual employment contract or even decision of dismissal or resignation) was chosen, the priority is to determine, based on the content of the act itself, which was the real will that was at its base, being in principle that the real will of the issuing party is decisive, not the literal meaning of the terms.

Regarding the possibility of the court to censure the denunciation of the individual employment contract within the probation period, it is limited. In this respect, the jurisprudence⁵ showed that „verification of the employee's skills during the probation period is the exclusive attribute of the employer. In other words, because the employer is the only one able to decide what his needs are in relation to the specifics of the job, the way he appreciates the skills and professional training of the probation employee cannot be censored by the court.”

As has also been pointed out in the doctrine (Parvulescu, 2021), it is not mandatory to motivate the notification, regardless of its issuer. The legislator did not consider any limitation on the possibility of the employer to order the termination of the employment relationship at the end of the probation period, as, had they considered such a limitation, they would have provided for certain exceptions.

⁵ Decizia Curții de Apel București nr. 2194/2019.

6. PROBATION PERIOD AND DISMISSAL FOR PROFESSIONAL MISCONDUCT

From the employer's perspective, if he wants the termination of the individual employment contract for professional inadequacy, he can use the provisions of article 31, paragraph 3 or the provisions of article 61, lit. d of the Labor Code.

If the employee does not correspond professionally, the employer may decide to dismiss him for reasons pertaining to the employee. This option requires the employer to complete additional formalities.

Thus, it is necessary to issue the dismissal decision, in accordance with the provisions of article 62, paragraph 1 of the Labor Code. It is also necessary, according to article 64, paragraph 1 of the Labor Code, that the employer propose to the employee other vacancies in the unit, compatible with the professional training. Last but not least, it is necessary to grant a notice period, which may not be less than 20 working days, as provided in article 75, paragraph 1 of the Labor Code.

Not being a dismissal, neither the prohibitions specified in article 59 of the Labor Code nor those of article 60 of the same Code are applicable.

Given the need to meet all these conditions, the employer will often opt for the simplified form, respectively for the issuance of a notice of termination of the individual employment contract during the probation period.

However, if the dismissal decision for professional misconduct was issued and the legal requirements were not complied with, and the employee is still in probation, then, it will obviously not be possible to invoke the fact that those formalities should not have been necessarily fulfilled.

As has also been pointed out in the judicial practice⁶, although it produces the same effect, the termination of the individual employment contract under article 31 paragraph 3 does not constitute a dismissal case. Also, it is not a dismissal in "connection with the person of the employee" in the specific sense of article 61 from the Labor Code, even if it can be assumed that, being ordered during the probation period, is actually motivated by the employer's assessment of the employee's compliance and adaptation to the job requirements, and, an appreciation which is not conditioned by the invocation and proof of sound arguments, on the contrary, expressly stipulated is that it is not necessary to motivate it.

7. THE PROBATION PERIOD AND THE TERMINATION OF THE INDIVIDUAL EMPLOYMENT CONTRACT BY AGREEMENT OF THE PARTIES

The termination of the individual employment contract may also intervene by agreement of the parties on the date agreed by them, even if the employee is on the probation period.

⁶ A se vedea Decizia civilă nr. 192/2022 a Curții de Apel București, secția a VII-a conflicte de muncă și asigurări sociale, publicată în Revista Romana de Dreptul Muncii nr. 1/2021

As regards the notification of the employee, it is obviously not necessary for the employer to approve this notification or to issue a decision in this respect, the notification taking effect per se (Marcu-Șiman, 2022).

8. THE PROBATION PERIOD AND THE LEGAL TERMINATION OF THE INDIVIDUAL EMPLOYMENT CONTRACT

The individual employment contract ceases by law, that is, in the power and effect of the law, when a certain cause (a fact, a legal act) expressly established by the rules of law, has occurred, which makes it impossible for the effects of that contract to continue to occur. The cases of termination of law are provided in article 56 of the Labor Code.

If, during the probation period, a case of legal termination of the individual employment contract occurs, this case will take precedence so that an option cannot be recognised between the termination of the law contract and the termination of the contract as a result of the notification, during the probation period.

The right of choice between the legal termination and the termination under article 31, paragraph 3 of the Labor Code cannot be recognized neither by the employer nor by the employee (Marcu-Șiman , 2022).

9. SUSPENSION OF THE INDIVIDUAL EMPLOYMENT CONTRACT WITHIN THE PROBATION PERIOD

The suspension of the individual employment contract represents a temporary cessation of the main effects of this contract: the provision of work by the employee and the payment of salary rights by the employer, according to article 49, paragraph 2 of the Labor Code.

Suspension of the individual employment contract may intervene by right, through the agreement of the parties or through the unilateral act of one of the parties.

In case of suspension of the individual employment contract, all the terms related to the conclusion, modification, execution or termination of the individual employment contract are suspended, except for situations where the individual employment contract ceases by law, provides article 49, paragraph 6 of the Labor Code.

It was appreciated that (Top , 2019), except for the quarantine, which "is the preventive isolation of a community that has been in contact with a contagious patient or with persons or materials coming from a region where there is an epidemic and constitutes a case of suspension "under the law of the employment contract, the other cases of suspension of law provided for in article 50 para. 1 of the Labor Code could not have any effect on the suspension of the probation period.

As regards us, having regard to the provisions of article 31, paragraph 4 of the Labor Code, according to which, during the probation period, the employee has all the rights and has all the obligations stipulated in the labor legislation, in the applicable collective labor contract, in the internal regulation, as well as in the individual employment contract, cases of suspension may have effects on the employee to the extent that they are compatible with the specifics of this method of verifying the professional skills of the employee.

10. CASE-LAW SOLUTIONS ON PROBATION PERIOD

- The law provides for a maximum duration of the probation period, but the effective duration is determined by the employer, with the agreement of the employee. The law provides for a maximum duration of the probation period, but the actual duration is determined by the employer, with the agreement of the employee. It is not possible to extend the length of the probation period by an act of unilateral will of the employer, whereas such a situation would disregard the principle of consensuality and good faith governing employment relations⁷.

- The termination of the individual employment contract during the probation period is not conditioned by the previous finding of the professional skills in the workplace of the employee, nor by the proof, by the employer, of the employee, objective cases justifying the taking of the measure. This is because the probation period has the legal nature of a legal clause for the individual employment contract, in favor of both parties⁸.

- Even if the wording of the individual employment contract is ambiguous, being provided for a duration of 90 calendar days/workers, it is clear from the above-mentioned legal provisions that the probation period is established on calendar days (and not working days) and the provisions of article 31, paragraph 1 of the Labor Code refers to the employment contract for an indefinite period, as long as the length of the probation period in the case of employment contracts concluded for a fixed period is regulated by article 85 of the Labor Code. In these circumstances, the ambiguous wording of this clause (without discussion, a material error resulting from the inadvertent editing of a pre-existing employment contract form) is likely only to attract the relative nullity of the clause thus formulated and its replacement with the legal provisions incidents, respectively those contained in article 31, paragraph 1 of the Labor Code⁹.

- If the employee is on sick leave, even if he is on probation, he cannot be fired while the employment relationship was suspended. The defendant's point of view cannot be retained, according to which, during the probation period, the individual employment contract can be terminated at any time and without motivation, even if the employee is on sick leave, whereas during the probation period the employee has all the rights of any employee. There is no legal provision to exempt from the illegality of the dismissal of the employee during the suspension of the individual employment contract on the grounds of temporary incapacity for work¹⁰.

11. CONCLUSIONS

The probation period has a special practical utility, being used in the overwhelming majority of situations and included in this respect in the individual employment contract.

Characterized as an optional clause, but binding when the parties negotiate its inclusion in the individual employment contract, the probation period really gives the parties the

⁷ Decizia Curții de Apel Timișoara nr. 68/2017, Secția litigii de muncă și asigurări sociale.

⁸ Decizia Curții de Apel Craiova, Secția de Litigii de Muncă și Asigurări Sociale nr. 587/2023.

⁹ Sentința Tribunalul București nr. 5841/2024 publicată pe <https://www.rejust.ro>.

¹⁰ Decizia Tribunalului Dâmbovița nr. 2015/2023.

opportunity to check whether the employee corresponds to the job occupied, namely whether the employer meets the requirements of the employee.

The simple way of terminating the individual employment contract within the probation period departs from the much more expensive solutions by which the employer can unilaterally order such a solution.

The possibility for the courts to control the measure of termination of the contract (Moldovan, 2023) ordered by any of its parties is quite small. However, the referral to the court cannot be ruled out when the notice of termination occurred after the expiry of the probation period or by committing an abuse of rights, for example, the employer requires the employee to perform extremely difficult or even different job-specific tasks (Țiclea, 2023). In such situations, the employee or the employer, especially the first of them, may address the court¹¹.

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¹¹ When an individual addresses himself to a judge, it is to demand a decision; and that decision must relate either to a matter of fact or to a point of law. See (Bodea, 2020).
