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GOOD FAITH PRINCIPLE AND THE EMPLOYMENT CONTRACT IN ALBANIA

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Abstract

The employment relationship is very complex and important, also for the fact that people spend considerable part of their time working and earn their living by working. The concept of the employment has changed fundamentally in centuries thus changing the relationship between employer and employee, in favor of the latter being known more rights and turning the employment in a decent opportunity to earn income. An employment contract marks the beginning of an employment relationship and gives rise to it. The employment contract is a "different" kind of contract, not only because it governs the whole employment relationship, but also for its specifics and the fact that there are a set of laws which regulate it. In Albania there is a proper Code of Labour which recognizes numerous types of employment contracts. This paper aims to focus on the importance of the employment relationship and to explain how it is regulated. This is to show how an employment contract is concluded, its conditions and its advantages towards at will employment. Through this paper will be highlighted the permeation of the employment contract by Labour Law Principles, especially the Good Faith Principle, from negotiations to contract's resolving. The paper will identify the protective role of this principle through the interpretation of The Albanian Code of Labour and court decisions.

Keywords: employment relationship, employment contract, good faith, parties behavior

1. INTRODUCTION

The right to work is probably one of the most important social and economic rights, recognized and guaranteed by numerous international legal acts. The concept of the employment has changed fundamentally in centuries thus changing the relationship between employer and employee, in favor of the latter being known more rights and turning the employment in a decent opportunity to earn income. Laws that supported slavery are abolished hardly and slowly, as well as forced labour is now prohibited.

The employment relationship is very complex and important, also for the fact that people spend considerable part of their time working and earn their living by working. The way the parties should behave towards each other depends on the type of work, in order to create a healthy

workplace environment. Despite the intent and spirit of laws to avoid disparity of the parties, in practice the employer is advantageous because he is the one that provides the conditions and selects from the potential candidates which are interested to have the job. Today's conditions make it quite difficult to find a good job and it seems that the employer advantage is increasing. The law provides that the employment relationship's beginning is marked by an employment contract concluded by mutual agreement, so that the employment relationship doesn't turn abusive.

The conclusion of an employment contract is generally the result of many efforts, concerns, and personal ambitions. In the best case this contract "rewards" personal achievements and experiences gained in previous jobs, but in any case provides the opportunity to have an employment relationship and to be remunerated for the work done or services rendered.

The enthusiasm of winning a job should not obfuscate the proper logic during the negotiations of the employment contract. The employment contract is an agreement, which form the basis of the employment relationship, determining the terms and conditions of employment. Before it is signed, it should at least be understood and accepted any of its condition, because the contract will govern the whole relationship.

The employment contract is a special kind of contract. It is a contract because it is an agreement between parties expressing their willingness to enter into a relationship and all the rights and obligations of the parties, but is special because of its great importance which affects the life of the employee. So the State and its laws, as also international legal acts have "framed" the freedom to contract an employment contract in order to protect the employee and the employer. The role of laws and other legal acts is to impose some standards to be achieved, which are necessary to develop a healthy employment relationship. An employment contract cannot be discriminatory or cannot contain severe conditions than those provided by law, for example lower wage than the minimum wage specified. The employment contract is also special because it can be collective or individual, a written contract or verbally agreed a fixed - term contract or an indefinite - term contract. There are recognized also other different kinds of employment contract, such as part time contract, probationary employment contract, work- from- home contract, etc.

This paper will try to express the concept and the importance of the employment contract, highlighting the advantages of the employee and the employer by regulating their relationship through the employment contract. The first part of the paper will clarify the legal meaning of the employment contract and its key points and also the specifics of this kind of contract.

Every human relationship, which is legally regulated, is certainly based on some well- known principles that permeate the entire relationship by making it acceptable and appropriate. Often some of these principles are quite explicit in legal texts as become part of specific legal provisions, such as prohibition of forced labour, prohibition of discrimination, trade union freedom. This doesn't mean that some other principles are lacking. Their presence can be clarified by interpreting the provisions. This is the case of good faith principle in Albanian Labour law. The second part of the paper will try to explain the importance of this principle in such a relationship and its protective role to the parties.

2. THE EMPLOYMENT CONTRACT

The issue of who is or is not in an employment relationship has become more and more problematic in recent decades. The employment relationship is a universal concept with common elements which can be found in countries with different legal systems and cultures as well as different economic and social environments. The existence of an employment relationship depends on the existence of objective conditions, i.e. on the form in which the worker and the employer have established their respective positions, rights and obligations. The determination of the existence of such a relationship should be guided primarily by the facts relating to the performance of work and the remuneration of the worker, notwithstanding how the relationship is characterized in a contrary arrangement that may have been agreed between the parties. (Bignami, R., Casale, G. & Fasani, M. 2013)

An employment contract marks the beginning of an employment relationship and gives rise to it. *"On the basis of an employment contract a natural person (employee) does work for another person (employer) in subordination to the management and supervision of the employer. The employer remunerates the employee for such work."* (Employment Contracts Act, art. 1) But The Employment Contracts Act presumed as an employment contract the work done for another person, if it is expected to be done only for remuneration.

Regarding Albania it must be said that unlike some other European states, there is a Code of Labour. This Code provides the employment contract as *"an agreement between employee and the employer, which regulates employment relationships and contains rights and obligations for the parties. In the employment contract the employee undertakes to provide its own work or service for a certain period of time or indefinitely, within the organization and the orders of another person, called employer who undertakes to pay remuneration."* (The Code of Labour of the Republic of Albania, art. 12) This means that at the end, the employment relationship has its own source in a contract between parties, formulated on two basic obligations: **remuneration** on one hand and **labor activity** on the other mutually connected by a node's ratio or functional interdependence. (Çela, K. 2005)

By interpreting the provisions of The Employment Contracts Act and The Albanian Code of Labour, arises the dilemma if the basis of the employment relationship can be considered a contract or not. One of the most important contractual principles is the Freedom of Contract that in this case seems lacking, even not entirely. Freedom of contract comprises three aspects: the freedom to contract, the freedom not to contract and the freedom to determine the contents of the contract at one's own discretion. (De Bondt, W. 2001) Actually the freedom to contract or not depends on the willingness of the parties. It is all about the freedom to determine the content of the employment contract. As mentioned above the employer is advantageous. Usually the employer determines the duties to perform by the employee, the wage, the time when to spend paid vacations. The employer also has the right to choose among the potential candidates and to hire whom he considered most appropriate candidate. There are few cases and circumstances when an employee may impose other conditions, rather than those already determined by the employer. Despite this the contract means that the parties cooperate as equal, but the employee lies in a hierarchical relationship of dependency towards his employer. It is well explained in

both abovementioned provisions the position of the employee. This probably can turn into an abusive relationship.

However, the Albanian Civil Code provides a general definition of the contract as *"a legal action through which a party or parties create, change or cancel a legal relationship."* (The Civil Code of the Republic of Albania, art. 659) In fact what is considered as an employment contract create the employment relationship, often contains clauses which permits changes of it according to certain circumstances and usually the parties, lawyers or courts refer to its termination clauses in order to terminate the employment relationship.

"Necessary conditions for the existence of the contract are: the consent of the party who assumes the obligation, lawful cause on which is based the obligation, the object that forms the subject matter of the contract and its form required by law." (The Civil Code of the Republic of Albania, art. 663) It is obviously clear that slavery or forced labour is prohibited, so to start an employment relationship is required the *mutual consent*, expressed clearly. The employee must express by himself, while employer also by an authorized representative. *The cause* of the contract is the purpose for which the expression of the will is made which consist in the duality service - remuneration. The cause must always be lawful. (Çela, K. 2005) *The object* of the contract is the work or the service, the physical or mental work for which earns remuneration. The Albanian Code of Labour recognizes the *written form* of the employment contract, as recognizes even the *contract verbally agreed* or changed. (The Code of Labour of the Republic of Albania, art. 21) Despite this the verbally agreed contract within 30 days must be in writing, signed by both parties, otherwise the employer is fined. (The Code of Labour of the Republic of Albania, art. 202) As a mutual agreement, which contains the necessary conditions for the existence of a contract and gives rise to the employment relationship, it can be considered a contract, although its specific characteristics.

If the contract is realized in the written form, The Code of Labour determines that it should contain the identity of the parties, the workplace, general description of the work, date of commencement of work, duration when the parties enter into a fixed-term contract and the applicable collective agreement. This contract should also contain duration of paid vacation, period of notice to terminate the contract, components of the salary and the date of its issuance and normal weekly working time, to which the parties may refer to provisions of the Code of Labour, or other legal acts in force. (The Code of Labour of the Republic of Albania, art. 21)

While the conclusion of an employment contract often "is celebrated" by the employee, generally the termination, or worse its dissolution is personally and financially badly experienced. The Albanian Labour Code recognizes the fixed - term contract and the indefinite - term contract. Normally the employment contract is concluded for an indefinite period. Contract of employment for a specified period (fixed term) must be justified on objective grounds, relating to the temporary nature of the work. (The Code of Labour of the Republic of Albania, art. 140) In resolving an employment contract the cause and the terms to notification of the parties are considered the most important elements of the procedure and are evaluated by court in judicial cases. Unfortunately in Albania there are numerous cases which show that most of employment contracts terminations are for no reasonable causes.

"The employment contract governs particular sphere of social relations, because its object is not like any goods or service in the market, but it is a complex dispositions of her subjects and

therefore in the resolving of a legal employment relationship must be respected the provisions of the individual or collective employment contract and the provisions of the Code of Labour dealing with a set of procedural rules that define the behaviors and attitudes of the parties during the process of resolving the employment contract." (Decision No. 392, date 15.02.2013 of the Court of Appeal of Tirana)

In other countries there are practiced "at will" contracts. This is a common law rule that an employment contract of indefinite duration can be terminated by either the employer or the employee at any time, for any reason. (http://legal-dictionary.thefreedictionary.com/Employment+at+Will) The termination section of the employment contract is the section that the employer and also the employee must pay attention when the contract is drafting. As the employee can only present his interest for the duration of the contract, the decision is up to the employer. At will contracts may be comfortable for the employer to dismiss employees with low performance from work or when he has to dismiss them according to business problems. At the other hand the employment contracts are advantageous because they "help" to clarify all the duties the employee must perform, to maintain employed qualitative employees and to minimize the risk of competition. However, the judicial practice has imposed exceptions to at will employment rule. The exceptions *(Public Policy Exception, Implied- Contract Exception and Covenant of Good Faith and Fair Dealing)* principally address terminations that, although they technically comply with the employment-at-will requirements, do not seem just. (Muhl, C. J. 2001)

3. GOOD FAITH AND THE EMPLOYMENT CONTRACT

The way the parties should behave towards each other, which are bound by an employment contract is expressed in all the mutual rights and obligations and in employment legal provisions. But beyond this there is always the duty of mutual trust, confidence and good faith, as the employment relationship *"is related to important element of a legal relationship, such as good faith, correct behavior and in accordance with professional standards"* (Decision No. 392, date 15.02.2013 of the Court of Appeal of Tirana)

Good faith is an abstract and comprehensive term that encompasses a sincere belief or motive without any malice or the desire to defraud others. (http://legal-dictionary.thefreedictionary.com/good+faith)

As in commercial contracts the principle of good faith is present even in employment relationships. The duty of good faith is a background condition imposed on all contracts that limits the negative effects of unequal bargaining power, but its enforcement is particularly challenging in the context of most employment relationships. (Bagchi, A. 2003)

Good faith performance means "not acting arbitrarily or capriciously; not acting with an intention to cause harm; and acting with due respect for the intent of the bargain as a matter of substance not form". (Carter, J.W., Peden, E. & Tolhurst, G. J. 2007, Cited in Riley, J. 2013)

In the case of employments, parallel transfers or promotions in the Civil Service, or in other institutions which organize contests and interviews, good faith principle should be kept in consideration by making possible transparent and non discriminatory hiring procedures, placing

the candidates under the same conditions. *"The decision of the direct superior should be motivated and based on the principles of equity, good faith and non discrimination."* (Decision No. 231 date 11.05.2000 of The Council of Ministers of Albania "For the admission in the Civil Service and the probationary period" paragraph 19) (Decision No. 342 date 14.07.2000 of The Council of Ministers of Albania "For the parallel transfer and promotion of the civil servant", paragraph 9) Also the personal data which are provided by the candidates for that reason should not be misused by the institutions. The employer during the employment relationship respects and protects the employee's personality. He must not gather information about the employee or to exercise control over the employee or his personal objects, except in cases provided by law. (The Code of Labour of the Republic of Albania, art. 32, 33, 34) In parallel transfers within the same institution or enterprise it may be considered violation of good faith principle if the employer transfers the employee so far from the city he lives, as to make it impossible for him to offer his work or service, "forcing" him to resign.

The employer within the good faith principle from time to time or whenever is necessary has to enable further qualification of his employees, at his expenses. This will not only increase the quality of work, but it will bring also long term benefits for the employer. The professional growth of the employee and the increase of his self confidence should not entail the avoidance of the employer's instructions. Based on legal and contractual obligations, in accordance with good faith principle, the employee must be careful and confident during the employment relationship. He must be responsible and loyal to the employer. The unilateral resolving of the employment contract by the employee, in order to make competition against the employer is a violation of good faith. (The Code of Labour of the Republic of Albania, art. 23, 24, 26, 27, 28)

Good faith comes into play when parties to an employment contract that contains imprecise commitments and discretions discover a need to determine the precise contours of their obligations and entitlements. (Riley, J. 2013) As the contract is an agreement concluded by mutual consent of the parties and the kinds of jobs offered are numerous, often some conditions of the employment contracts which are determined in values, numbers or time depend on the performance of the employee, his needs, the business progress or the way the tasks need to be fulfilled. This is the case when the wage of the employee is calculated on a percentage of profits or when the parties agreed to bonuses if the employee has high performance. If the employer doesn't perform the employment contract in good faith, the employer cannot take what he deserves. It has to be accepted that the employer is considered the advantageous party and he has the greater possibility to avoid the application of the principle during his behavior. This might be also the case of the paid vacations or extra hours of work. The law provides working more than determined working hours and the relevant compensation. The employer must act in good faith when seeking extra hours of work, referring to health conditions or family conditions of his employees. So it cannot be considered lack of good faith when the employee refuses to perform extra hours of work beyond his possibilities. (The Code of Labour of the Republic of Albania, art. 89) These provisions are not strictly determined, so the situation may turn into abusive. So if some of the conditions are not strictly determined, the parties should behave properly, in accordance with the good faith principle, in order not to cause any damage.

The Albanian Code of Labour expressly mentions good faith only one time, but the presence of good faith is clear in interpreting legal provisions.

"The employer and the employee, at any time, may immediately resolve the contract for justified reasons. There are evaluated as justified reasons all serious circumstances that do not allow, under the principle of good faith, the one who has to resolve contract to continue employment relationships." (The Code of Labour of the Republic of Albania, art. 153) These serious circumstances must exist and be mentioned in the document which terminate the employment relationship. *"Only the formal note of such motivation without relying on any other evidence constitutes an illegal practice and contrary to the principle of good faith and professional standards of the behavior of related parties in an employment contract."* (Decision No. 392, date 15.02.2013 of the Court of Appeal of Tirana) The court has the prerogative to evaluate if the reasons are *justified* or not, but each of the parties have to prove their claims. This provision recognizes the principle of good faith as the set standard to justify the termination of the employment relationship. This concerns unacceptable situations which have brought damages or abusive situations. The recognition and presence of the principle is a guarantee to protect the weak party, which in most cases is the employee.

The Albanian Supreme Court has considered as "tactics" clearly in violation of good faith principle the wrong interpretation and use of the provisions of the Code of Labour related to restructurings thereby resolving the employment contracts before the terms provided. (Decision No. 274, date 24.05.2011 of the Supreme Court of Albania)

4. CONCLUSIONS

In the basis of the employment relationship stands the employment contract. Despite the specifics of the employment contract which make it different from other commercial contracts, the employment contract is a contract and must be negotiated and performed in good faith.

Good faith is not required to decorate the employment relationships. It is recognized as an important principle and is set as a standard to be achieved by the parties. As the employment relationship puts the parties in different positions towards each other, good faith principle as other Labor Law principles tends to protect the less advantageous party.

All the actors in the employment relationship: the employer, the unions and the employees should behave in good faith. They have to be careful, responsible, directly and reasonable. The decision making which affects work processes or interests of employees should be made known to them and the employer has to be sure that the information is understood properly.

Work difficulties often create unpleasant situations that must be passed to be back to normal. This requires the will of all the parties. This requires appropriate communication, understanding, cooperation and finding the best solution.

Even the good faith principle is just once cited in the Code of Labour, from the overview of this Code is quite clear that good faith is present in the employment contract and is quite important, because often it "soften" the disparity between parties or prevent abusive situations. In fact it is difficult to prove the behavior in good faith. Each of the party may pretend such a behavior, but they are in different positions and they make evaluations from different points of view. But one thing is clear when there is good faith there are less misunderstandings, less conflict and problems.

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