

MATTERS ON THE LEGAL REGIME OF EMPLOYEES' INDIVIDUAL PERFORMANCE OBJECTIVES

Ph.D. student **Radu Ștefan PĂTRU**¹

Abstract

Law 40/2011 brought significant changes to the work relations by the reorientation of certain labour law institutions on the one hand, and by the introduction of legal institutions that have never existed in the Romanian law system until the introduction of this law. Among the significant developments introduced by Law 40/2011, the employees' individual performance objectives will be hereby analysed in terms of the legal regime and of the issues occurring with their applicability for employees.

Keywords: *Law 40/2011, employees' individual performance objectives, legislative developments, balance between employer and employee rights.*

JEL Classification: *K31*

Introduction

Just like for the other contracts, the contents of the Individual Labour Contract consists of rights and obligations of the parties.

Given the specificity of this contract, the content thereof is circumscribed to the rights of the employer and of the employee.

Article 39 and Article 40 of Law 53/2003 (Labour Code) provide the rights and obligations of the employer and of the employee with in order to execute the Individual Labour Contract².

Law 40/2011³ changed the legal framework for the work relations, adding new labour law institutions, some of them being regulated in the Romanian legal environment for the first time.

Among them, we will cover the employees' individual performance objectives, which are regulated by the Romanian labour law for the first time.

The Legal Regime of Employees' Individual Performance Objectives

The relevant legal provisions relating to the employees' individual performance objectives are mainly Art. 40 (f) of the Labour Code, which establishes the employer's right to "set the individual performance objectives, as well as the evaluation criteria for their accomplishment."

Moreover, Article 69 of the Labour Code was supplemented with an additional paragraph, i.e., par. (3), which provides that, in terms of collective redundancy, the accomplishment of the performance objective will be important for employee categorisation, confirming a switch from social criteria for employee categorisation to the professional ones.

The individual performance objectives are an advantage for the employer, which is free to set these objectives on an individual basis after the conclusion of the individual labour contract.

In order to determine the legal regime of individual performance objectives, they must be analysed in correlation with other related labour law institutions.

As such, when benchmarking the performance objectives and the evaluation criteria for individual performance objectives, it must be noted that the latter are part of the employer's

¹ Radu Ștefan Pătru, Bucharest University of Economic Studies, radupatru2007@yahoo.com

² Labour Code as updated in 2012 (Law 53/2003) and republished and re-numbered in the Official Journal no. 345 of the 18th of May 2011, on the grounds of Art. V of Law 40/2011 amending and supplementing Law 53/2003.

³ Labour Code as updated in 2012 (Law 53/2003) and republished and re-numbered in the Official Journal no. 345 of the 18th of May 2011, on the grounds of Art. V of Law 40/2011 amending and supplementing Law 53/2003

information obligation and are undertaken by the employee before concluding the individual labour contract.

Article 17 (3) (e) certifies that the employer has the obligation to inform the employee concerning such criteria and, by subsequently signing the individual labour contract, the employee agrees to accept thereof.

Furthermore, the criteria thus jointly agreed become an integral part of the individual labour contract in accordance with the provisions of Art. 17 (4) of the Labour Code.

The evaluation criteria for the individual performance objectives are also provided in the Internal Rules, in accordance with the provisions of Art. 242 (i) of the Labour Code.

These matters have special legal implications because, on the grounds of the principle of legal act symmetry, the employer cannot change the evaluation criteria for the employees' individual performance after concluding the individual labour contract unless the concerned employee so agrees, which cannot also be applicable for the employees' performance objectives⁴.

The employer may unilaterally change the performance objectives during the individual labour contract execution.

In terms of the legal manner to make such change, we are of the view they may be changed by way of an addendum to the individual labour contract.

Moreover, the individual performance objectives must not be mistaken with the job description attached to the individual labour contract and are legally concluded by joint agreement in principle when the individual labour contract is signed.

At the same time, the individual performance objectives must not be mistaken with the work quota either, because the work quota mainly relates to the quantitative matters of the employee's work, while the individual performance objectives relate to the quality and results of the work.

Considering the above-mentioned matters, a legitimate question would be: 'What are the consequences for employees who do not accomplish the performance objectives'? Will they be dismissed as a result of their non-compliance or may they be subject to other types of penalties? We are of the view that the non-accomplishment of the individual performance objectives does not entail the employee's dismissal. However, the employee may be subject to legal penalties only after a preliminary evaluation or after a preliminary disciplinary hearing, as applicable⁵.

The penalties that may be applied to employees depending on their total or partial failure to accomplish the individual performance objectives would include the non-granting of bonuses, exclusion from the promotion list, changing the place of work or type of work with the agreement of the concerned person, or application of disciplinary sanctions, other than dismissal for disciplinary actions⁶.

Furthermore, the accomplishment of the performance objectives in a professional manner does not entail the employer's obligation to reward the employees having precisely accomplished them; this prerogative is at the employer's exclusive option.

As previously stated, the individual performance objectives play a special part in case of collective redundancy and this because they relate to the concept of professional evaluation of the employees.

⁴ See Ion Traian Ștefănescu, *Tratat teoretic și practic de Drept al Muncii (Theoretical and Practical Treaty of Labour Law)*, Universul Juridic Publishing House, Bucharest, 2012, p 303.

⁵ *Idem*, p. 304.

⁶ Ion Traian Ștefănescu, *Repere concrete rezultate din recenta modificare și completare a Codului Muncii (Concrete Landmarks Resulting from the Recent Amendment and Supplementation of the Labour Code)*, *Revista Română de Jurisprudență (Romanian Jurisprudence Magazine)*, no. 2/2011, p. 17.

Once Law 40/2011 came into force, the selection criteria for the employees not subject to collective redundancy were no longer circumscribed to special conditions, but to matters relating to the employee value and competence. This is also a result of the fact that, following the new changes in the labour law, the part of the collective labour contracts, which predominantly provided social criteria for collective redundancy, recorded a significant decrease.

Another matter relating to the legal regime of performance objectives would be their applicability for civil servants. Considering the legal status of civil servants, as circumscribed mainly to Law 188/1999, the matter of the applicability of the provisions of Law 40/2011 for them cannot be raised, even less that of the provisions on the performance objectives.

The situation is entirely different for the employees of public institutions, who do not have the capacity of civil servants and for whom the employer may establish performance objectives just like for any contractual employee subject to the provisions of the Labour Code.

The Employees' Individual Performance Objectives: a Mere Legal Instrument Available to the Employer?

The introduction of the individual performance objectives for the first time in our legislation was not unreservedly received in the legal doctrine because they favour especially the employer.

To this effect, it has been said it was unfair for performance objectives to be unilaterally established by the employer⁷.

This opinion is grounded on the fact that the exclusive establishment by the employer of the performance objectives is in conflict with the fact that, in general, the work relations are bilateral, the employees being invited to agree on each significant aspect for their activity.

For instance: the conclusion of the individual labour contract, the information obligations that also implies the information on the responsibilities of the job on which the employee is invited to agree by signing the Job Description, etc.

At the same time, the fact that the employer may establish the performance objectives at any time after conclusion of the individual labour contract is criticisable, because there is no timeframe within to inform the employee on the objectives they have to accomplish.

Furthermore, the employer has the right to amend the individual performance objectives of the employee at any time during the contract execution, and this would equal to a "changing of the rules during the game"⁸, which would prejudice the employees, especially because they may be deemed not to be appropriate for their job.

Moreover, the employer's obligation to inform the employee on their individual performance objectives does not exist, and this could lead to a paradoxical situation where, although the professional evaluation criteria are part of the individual labour contract, individual performance objectives could not be communicated to the employee, leaving way for its sanctioning by the employer.

In order to avoid such situations, the doctrine has reasonably proposed that the performance objectives be included on the individual labour contract with a view to balancing the relation between the employee and the employer in terms of performance objectives⁹.

⁷ Șerban Beligrădeanu - Principalele aspecte teoretice și practice rezultate din cuprinsul Legii nr. 40/2011 pentru modificarea și completarea Legii nr. 53/2003 - Codul Muncii (*Main Theoretical and Practical Matters Resulting from Law 40/2011 Amending and Supplementing Law 53/2003- Labour Code*), in Revista Română de Dreptul Muncii (*Romanian Labour Law Magazine*), no. 3/2011, p. 33.

⁸ Idem, p. 34

⁹ Claudia Ana Moarcăș Costea, Evaluarea salariaților în raport cu criteriile de performanță și natura juridică a obligațiilor specifice contractului individual de muncă (*Employee Evaluation According to the Performance Criteria and the Legal Status of*

Considering that the work relations are mainly characterised by the mutual trust of the parties, it is not excluded for the individual performance objectives to be established bilaterally between the employer and the employee.

Also, on the grounds of the principle of contractual freedom, the parties may jointly agree on the communication of the objectives, the review or accomplishment thereof, or they may include the performance objectives on the individual labour contracts.

This seems to be all the more relevant as the timeframes for analysing the performance objectives are not set by the legislators, which means that, in this situation also, this faculty is left at the employer's unilateral option, without a legal obligation to advise the employee¹⁰.

At all events, the employer does not have the right to establish performance objectives contradicting with the provisions of the Job Description or of the Individual Labour Contract.

Matters Specific to Trials

Another issue arising from the analysis of the matters concerning the individual performance objectives would be the employee's possibility to notify the Courts of Law on the prejudice caused to their rights because of the employer establishing performance objectives.

We consider the legal grounds to be used by the employee is the misuse of rights, which occurs when the employer establishes abusive performance objectives, which are entirely different from the provisions of the Job Description and cannot be accomplished by the employee.

Moreover, another legal ground may be the breach of the non-discrimination principle, when the performance objectives are set so as to be in breach of this principle, which is extremely important for the work relations¹¹.

In this case, the employee may notify the Court of Law and request the annulment of the abusively established performance objectives and of the sanctioning decision, when the employer ordered penalties against the former.

Another controversial issue that may also be reflected in the legal practice relates to the personnel categories on whom the accomplishment of the performance objectives is imposed.

Therefore, the issue of whether performance objectives can be established for employees on trial or training periods, for disabled employees or for unskilled workforce.

A view is that, for obvious reasons, individual performance objectives cannot be established for these employee categories¹².

From this perspective, for instance, may an unskilled employee notify the Court of Law requesting the annulment of the performance objectives having been imposed by the employer?

Although we agree with the reasons leading to the conclusion that individual performance objectives cannot be established for these employee categories, we cannot help noticing that the law provides that these employee categories are not covered by the requirement of having to meet certain performance objectives established for them, and, as a result, the Court of Law may dismiss a request filed by this category of employees.

the Obligations Specific to Individual Labour Contracts), in *Modificările Codului Muncii și ale Legii Dialogului Social (Changes to the Labour Code and of the Social Dialogue Law)*, Universul Juridic Publishing House, Bucharest, 2011, p. 52.

¹⁰ C. Gâlcă, *Scurtă analiză a modificărilor Codului Muncii (II) - Executarea, modificarea, suspendarea și încetarea contractului individual de muncă (A Short Analysis of the Changes to the Labour Code [II] - Execution, Amendment, Suspension and Termination of the Individual Labour Contract)*, *Revista de Drept Social (Social Law Magazine)*, no. 4/2011, p. 5.

¹¹ See Claudia Ana Moarcăș Costea, above-mentioned work. Pp. 51-52.

¹² See Ion Traian Ștefănescu, *Tratat teoretic și practic de Drept al Muncii (Theoretical and Practical Treaty of Labour Law)*, Universul Juridic Publishing House, Bucharest, 2012, p. 302.

In the future, it is required for the legislator to expressly exclude the above-mentioned categories of employees from those for whom performance objectives are established, in order to allow an unambiguous legal status for them.

Conclusions

The individual performance objectives are, beyond any doubt, a development that will play an important part in the outlining of the work relations as entailed by the changes brought to Law 40/2011.

Although, according to the manner in which they are regulated, they seem to clearly be benefiting the employer, we consider that, if the parties to the individual labour contracts act in good faith, the performance objectives will seem to benefit both parties - the employer that, by establishing such objectives will have the sought efficiency from the employee, and the employee, who, by meeting the performance objectives, will significantly improve their professional skills.

However, an improvement of the legal framework is required in order to balance the weight of the employee's and employer's rights in terms of performance objectives, with a view to avoiding immediate abuses from employers.

Such improvement could be aimed at a joint establishment of the performance objectives, at preventing the employer to unilaterally amend the performance objectives but to do so with the employee's consent or at imposing on the legislator to provide the employee categories for which the accomplishment of individual performance objectives cannot be requested.

Bibliography

1. Ion Traian Ștefănescu, *Tratat teoretic și practic de Drept al Muncii (Theoretical and Practical Treaty of Labour Law)*, Universul Juridic Publishing House, Bucharest, 2012.
2. Ion Traian Ștefănescu, *Repere concrete rezultate din recenta modificare și completare a Codului Muncii (Concrete Landmarks Resulting from the Recent Amendment and Supplementation of the Labour Code)*, *Revista Română de Jurisprudență (Romanian Jurisprudence Magazine)*, no. 2/2011.
3. Șerban Beligrădeanu - *Principalele aspecte teoretice și practice rezultate din cuprinsul Legii nr. 40/2011 pentru modificarea și completarea Legii nr. 53/2003 - Codul Muncii (Main Theoretical and Practical Matters Resulting from Law 40/2011 Amending and Supplementing Law 53/2003- Labour Code)*, in *Revista Română de Dreptul Muncii (Romanian Labour Law Magazine)*, no. 3/2011.
4. Claudia Ana Moarcăș Costea, *Evaluarea salariaților în raport cu criteriile de performanță și natura juridică a obligațiilor specifice contractului individual de muncă (Employee Evaluation According to the Performance Criteria and the Legal Status of the Obligations Specific to Individual Labour Contracts)*, in *Modificările Codului Muncii și ale Legii Dialogului Social (Changes to the Labour Code and of the Social Dialogue Law)*, Universul Juridic Publishing House, Bucharest, 2011.
5. C. Gâlcă, *Scurtă analiză a modificărilor Codului Muncii (II) - Executarea, modificarea, suspendarea și încetarea contractului individual de muncă, (A Short Analysis of the Changes to the Labour Code [II] – Execution, Amendment, Suspension and Termination of the Individual Labour Contract)*, *Revista de Drept Social (Social Law Magazine)*, no. 4/2011.
6. *Labour Code as updated in 2012 (Law 53/2003) and republished and re-numbered in the Official Journal no. 345 of the 18th of May 2011, on the grounds of Art. V of Law 40/2011 amending and supplementing Law 53/2003*
7. *Law 40/2011 amending and supplementing Law 53/2003 (Labour Code) as published in the Official Journal of Romania, Part I, no. 225, of the 31st of March 2011.*