

# REMARKS ON THE PROFESSIONAL INADEQUACY IN THE LIGHT OF ARTICLE 61 LETTER D) OF LABOR CODE<sup>1</sup>

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## **Abstract**

*The herein study aims to clarify some confusions, that appear during the application and interpretation of the Labor code's provisions regarding the dismissal for being professionally unfit established by Article 61 letter d) of Labor Code. In the absence of an express definition of this notion in the Labor Code, the jurisprudence has shaped some landmarks regarding the professional inadequacy. In order to enclose this concept it is necessary to draw up an analysis of the norms regarding the conclusion of the individual employment contract by verifying the employee's personal and professional skills as well as those regarding the dismissal for being professionally unfit. In order to establish the professional inadequacy, obviously, one must also bear in mind the employee's job description, which is necessary to be related with the employee's individual professional performance objectives, as they are unilaterally determined by the employer.*

*The second goal of this research concerns the procedure of professional assessment of the employee, the analysis having as objectives the ascertainment of the legal document that must embody this procedure, the way to conduct the procedure and the consequences brought by this professional assessment.*

**Keywords:** individual employment contract, professional inadequacy, professional assessment, dismissal

**JEL Classification:** K31

According to Article 61 letter d) of Labor Code, the employer can order the dismissal "if the employee is not professionally fit for his/her job". In the absence of some express norms regarding the meaning of the notion of professional inadequacy, an important role was played by the jurisprudence and legal doctrine<sup>3</sup>, which have offered appropriate solutions. The herein study aims to clarify some confusions<sup>4</sup>, that appear during the application and interpretation of the Labor code's provisions regarding the dismissal for being professionally unfit established by Article 61 letter d) of Labor Code.

The opinions given herein, namely the fact that: the professional inadequacy is not related to the employee's fault, that in order to consider a professional unfitness, usually, the facts have to have a character of repeatability, that the possibility of dual facts is not excluded, that the procedure of previous assessment cannot be included in the individual employment contract, that the professional assessment must be performed in relation to the job description and the professional performance objectives, if they exist, are embodied in the current jurisprudence.

**A. a.** From a historical point of view, of the legislation's evolution, we must mention that the professional inadequacy represented a case for the termination of the individual employment contract also under the application of the 1950<sup>5</sup> and 1973<sup>6</sup> Labor codes. If, at first (under the 1950 and 1973 regulations) the inadequacy referred together with the professional capability also to the employee's working capacity (for example, its diminution or loss), within the current Labor Code –

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<sup>3</sup> See I.T. Ștefănescu, *Theoretical and practical treaty of employment law (Tratat teoretic și practic de drept al muncii)*, 3<sup>rd</sup> edition, revised and added, Universul Juridic Publisher, Bucharest, 2014, p. 441; A. Țiclea, *Labour law treaty – Legislation. Doctrine. Jurisprudence (Tratat de dreptul muncii – Legislație. Doctrină. Jurisprudență)*, 8<sup>th</sup> edition, revised and added, Universul Juridic Publisher, Bucharest, 2014, p. 740; R. Gidro, *Labour law. University course (Dreptul muncii. Curs universitar)*, Universul Juridic Publisher, Bucharest, 2013, p. 144; M. Volonciu in Al. Athanasiu, M. Volonciu, L. Dima, O. Cazan, *Labour Code. Comments on articles. Vol. I, Articles 1-107 (Codul muncii. Comentariu pe articole. Vol. I. Articolele 1-107)*, C.H. Beck Publisher, Bucharest, 2007, p. 195 și urm.; Al. Athanasiu, L. Dima, *Labour law, (Dreptul muncii)*, All Beck Publisher, Bucharest, 2005, p. 133 et seq.

<sup>4</sup> Recently, there has been a debate in which it were discussed some issues related to the theme of dismissal the employee for his professional inadequacy. See <http://dezbatere.juridice.ro/2453/concedierea-pentru-necorespundere-profesionala>.

<sup>5</sup> Published in the "Official Gazette", no. 3 from the 30<sup>th</sup> of May, 1950.

<sup>6</sup> Published in the "Official Gazette", no. 140 from the 1<sup>st</sup> of December, 1972.

Law No. 53/2003, republished – the medical unfitness can be found in a distinct case of dismissal, at letter c of Article 61.

Within the literature on the matter<sup>7</sup>, a point of view was formulated, according to which the physical and/or mental inaptitude of the employee should represent a reason of professional inadequacy and therefore, it should be included in Article 61 letter d of the Labor code. Given the elements of specific nature taken into consideration by the legislator, the medical component and the one related to the professional unfitness, it results that they are distinct reasons for which the employer may order the dismissal of the employee. Thus, we believe that the regulation must remain in its current form, as two possible hypotheses of dismissal.

**b.** The legal text (Article 61, letter d) of Labor Code, must be interpreted in the light of the reality that, usually, the employees do not have the obligation to professional improvement<sup>8</sup>. Article 39 letter g of Labor code states the employee's right to professional training. Not having such an obligation, to improve his professional skills, in the event when the employee does not perform his professional duties or performs them in a faulty manner, he cannot be dismissed for disciplinary reasons in the absence of his fault, and thus, dismissal may be ordered only on grounds of Article 61 letter d of Labor code for not being professionally fit. On the contrary, when the employee has the legal obligation of professional training (for example, the teachers, according to Article 245 and 303 of Law No. 1/2011 on the national education), every time he does not properly perform his professional duties, his fault is in question and so is the disciplinary dismissal. This solution is enforced when the employer provided the employee with all the necessary conditions for his professional improvement, and the latter did not use them. Thus, each case requires a particular analysis, whether the employee had the obligation of professional training/improvement. In this case, the failure to perform or the faulty performance of the obligation represents a misconduct which entitles the employer, if the other conditions are met, to order the disciplinary dismissal of the employee, on grounds of Article 61 letter a of Labor code. Distinctly, the question rises whether the employee's obligation to professional training results from a negotiated clause of the collective labor contract or of the individual employment contract, and therefore the failure to perform or the faulty performance may bring about the disciplinary dismissal or the dismissal for professional unfitness? If the collective agreement from the unit's level requires to the entire team or just to a part of it the liability of professional instruction, the employer may decide the dismissal of the employee who doesn't fulfill his obligation. The formal argument for this assertion is that the obligation of professional instruction would be inserted into the collective agreement, which is a specific source of the labour law. Even if at the first glance it would seem that Article 38 of the labour Code it is violated, we believe that the employee may assume the obligation of professional instruction in the employment contract because the employee does not waive to his right which is not reduced.

**c.** The dismissal for not being professionally based on Article 61 letter d of Labour Code is the lack of employee's fault which delimits the case from the disciplinary misconduct. Hearing the exception of unconstitutionality of the Article 64 of Labour code, the Constitutional Court<sup>9</sup> has settled that the criticized legal text establishes protection measures for the employees in those situations that have occurred objective factors that prevent further filling station owned, but not caused by negligence of employees. The Constitutional Court has set out the following considerations that we consider relevant to clarify the meaning of the concept of professional inadequacy: "Thus, the circumstances related to the health of employees and those resulting from his professional inadequacy that occurred during the employment contract and those who are

<sup>7</sup> See R. Dimitriu, Reflections on dismissal for inadequacy physical and / or mental of the employee, (*Reflecții privind concedierea pentru inaptitudine fizică și/sau psihică a salariatului*), in R.R.D.M. nr. 4/2004, p. 41.

<sup>8</sup> See I.T. Ștefănescu, *Theoretical and practical treaty of employment law (Tratat teoretic și practic de drept al muncii)*, 3<sup>rd</sup> edition, revised and added, Universul Juridic Publisher, Bucharest, 2014, p. 441; in a different opinion, see M. Volonciu in Al. Athanasiu, M. Volonciu, L. Dima, O. Cazan, *Labour Code. Comments on articles. Vol. I, Articles 1-107 (Codul muncii. Comentariu pe articole. Vol. I. Articolele 1-107)*, C.H. Beck Publisher, Bucharest, 2007, p. 19.

<sup>9</sup> Published in the "Romanian Official Gazette", part I, no. 727 from the 1<sup>st</sup> of November, 2010.

following the reinstatement of an employee in the position occupied previously dismissed for unlawful or unjustified reasons not attributable to the employee. In this context it should be noted that professional inadequacy does not identify with a disciplinary misconduct, but it is the result of coming into force of laws that impose additional conditions to those originally required at the time when the employee was hired, whether as a result the lack of professional training, while the law does not establish an obligation to improve or even due to reduced work capacity, however arising during performance of the contract". In order to decide the dismissal, the employer may take into account facts that are dual, committed with or without any fault, or even a fact that have both natures. The employer has the right to decide on the basis of dismissal, disciplinary or professional inadequacy. In practice, due to the legal disciplinary procedure established in the Labour Code and the lack of protection measures granted to the employee, the employer chooses the disciplinary dismissal of the employee according to the Article 61 letter a) of Labour Code.

d. From the wording of art. 61 letter d), one might understand that the employer decides on dismissal exclusively on the grounds of *professional* inadequacy. Still, the concept of "professional inadequacy" does not express, at it might seem at first glance, only the theoretical components of training, but also the practical ones, as well as the employee's abilities. Analysing the texts regarding the conclusion of the individual labour agreements, one cannot ignore the provisions of art. 29 paragraph 1 and art. 31 paragraph 1 from the Labour Code. Hence, checking the person requesting employment is done concerning his/her professional and personal skills. Primarily, the employer focuses on the capacity and professional skills of the person seeking employment, but depending on the specificity of the work place, the employer may request the fulfilment of other criteria. Hence, we appreciate there must be a symmetry of the conditions taken into account by the employer upon contract conclusion and when the employee is dismissed for professional inadequacy. As a result, professional inadequacy must mean either the lack of the employee's professional training or the loss<sup>10</sup> of skills or even both. Obviously, the employee's incompatibility intervenes during the execution of the individual labour agreement in the sense that, even though the employee initially met the professional and personal requirements for the position it has, in fact he/she is no longer fit for that. Professional inadequacy may be determined:

- either by legislative amendments which impose other studies, different from previous ones, which the employee no longer meets (for instance, imposing education conditions higher than those held by the employee; establish the condition for permit/certificate/authorisation for exercising the attributions of a specific position);
- or the employee can no longer adequately perform his/her duties for reasons beyond his control (low biologic capacity to work) or because he/she is not properly prepared professionally.

It should be noted that one cannot speak of be a loss of the employer's confidence in the employee<sup>11</sup>. Any loss of confidence may be the result of acts committed by the employee, with fault or without fault.

e. In appreciating the employee's compliance/non-compliance, a special role is held by the job description<sup>12</sup>, which represents an objectification of the individual labour agreement. Without having a legal definition, the Labour Code expressly refers to this document:

- under the obligation to inform, the person selected for employment or the employee, as appropriate, must be informed at least on the "position/occupation according to the specification of the Classification of Occupations in Romania or other regulations and the job description, specifying the duties" – art. 17 paragraph 3 letter d);
- among the employee's main obligations is the "obligation to perform the work quota or, where appropriate, to fulfill his/her tasks according to job description". At the same time, letter F from the framework model of the individual employment contract stipulates that job duties are set out in the

<sup>10</sup>See M. Volonciu in *op.cit.*, vol. I, by Al. Athanasiu, M. Volonciu, L. Dima, O. Cazan, p. 150.

<sup>11</sup>I.T. Ștefănescu, *Theoretical and practical treaty of employment law (Tratat teoretic și practic de drept al muncii)*, 3<sup>rd</sup> edition, revised and added, *loc.cit.*, p. 444.

<sup>12</sup> See A.G. Uluitu, *Job description*, in „Romanian magazine for employment law (Revista română de dreptul muncii)” no. 4/2012, p. 16-22.

job description, which is attached to the individual employment contract. We share the view<sup>13</sup> according to which the job description is a negotiated document, annex to the individual employment contract. The job description, defining and embodying the function or position held by the employee, is not made according to the personal and professional qualities or skills of the concerned person. Compared to its content, the job description is relevant to dismiss the employee for professional inadequacy<sup>14</sup>.

Appreciating the employee's professional inadequacy through the attributions and abilities connected to his/her behaviour in the workplace, set in the job description, it is necessary to evaluate it in connection to the individual professional performance objectives and the assessment criteria for their fulfilment. Under art. 40 paragraph (1) letter f) from the Labour Code, the employer has the exclusive prerogative to set individual performance objectives.

In terms of individual performance objectives, several opinions have been formulated in the literature. One point of view argued that the individual performance objectives and the assessment criteria must be set by mutual agreement of the parties as they are the "natural result of job duties" and should be included in the job description, which shall be made by the parties' agreement<sup>15</sup>. Further on, it is argued that being set unilaterally by the employer, the performance objectives may change at any time, unilaterally, during the performance of the contract, a prerogative that appears to be unnatural and inconsistent with other provisions of the Labour Code. As a result, the employee may be considered inappropriate for the position he/she holds only in case of non-compliance or non-fulfillment of the performance objectives set by the parties' agreement, which may entail the dismissal of the person in question under art. 61 letter d) of the Labour Code.

According to another opinion, individual performance objectives are precisely the labour rate which the employee must carry out during a period of time. It is exceptionally shown that these may be higher than the labour rate when technical, organisational conditions allow this<sup>16</sup>.

Finally, a point of view has been formulated according to which the individual performance objectives can be set unilaterally by the employer and aim "par excellence, at the quantitative component of work, obtaining superior results"<sup>17</sup>. We concur with this point of view, regarding which we formulate the following clarifications:

- being a right recognised for the employer [art. 40 paragraph (1) letter f) from the Labour Code], it can set individual performance objectives and criteria to unilaterally assess their fulfilment. The employer has the possibility of waiving this legally recognised right because the restriction under art. 38 from the Code refers only to employees. Therefore, the employer can choose not to set individual performance objectives or to set them with the employee's agreement.
- the employer sets individual performance objectives only taking into consideration the specific attributions in the job description, the professional capacity and the skills of each employee<sup>18</sup>. Because the Labour Code makes no reference to the sphere/categories of employees for which performance criteria can be set, it appears as rational the interpretation according to which not all employees can be set with performance criteria or it is inconclusive to have such objectives set for

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<sup>13</sup> See B. Vartolomei, *Employment law for the economics education (Dreptul muncii pentru învățământul economic)*, Economică Publishing House, Bucharest, 2009, p. 70; A.G. Uluitu, *Job description, loc.cit.*, p. 19; I.T. Ștefănescu, *Theoretical and practical treaty of employment law (Tratat teoretic și practic de drept al muncii)*, 3<sup>rd</sup> edition, revised and added, *loc.cit.*, p. 331. In the legal doctrine, there emerged the view that job description should be a unilateral act of the employer. See in this respect, Al. Athanasiu, *Labour Code. Comments on articles. Update to vol. I-II (Codul muncii. Comentariu pe articole. Actualizare la vol. I-II)*, C.H. Beck Publishing House, Bucharest, 2012, p. 9-10.

<sup>14</sup> Job descriptions are important for setting goals/individual performance objectives; if an individual employment agreement modification is legal; granting entitlements in case of the invalidity of the individual employment agreement.

<sup>15</sup> Ș. Beligrădeanu, *Main theoretical and practical issues resulted from Law no. 40/2011 on the amendment and addition of the Labour Code – Law no. 53/2003 (II) (Principalele aspecte teoretice și practice rezultate din cuprinsul legii nr. 40/2011 pentru modificarea și completarea Codului muncii – Legea nr. 53/2003 (II))*, in "Law (Dreptul)" no. 7/2011, p. 26-27.

<sup>16</sup> A. Țiclea, *Labour law treaty – Legislation. Doctrine. Jurisprudence (Tratat de dreptul muncii – Legislație. Doctrină. Jurisprudență)*, 8<sup>th</sup> edition, revised and added, *loc.cit.*, p. 470.

<sup>17</sup> See I.T. Ștefănescu, *Theoretical and practical treaty of employment law (Tratat teoretic și practic de drept al muncii)*, 3<sup>rd</sup> edition, revised and added, *loc.cit.*, p. 321.

<sup>18</sup> See I.T. Ștefănescu, *Theoretical and practical treaty of employment law (Tratat teoretic și practic de drept al muncii)*, 3<sup>rd</sup> edition, revised and added, *loc.cit.*, p. 321.

them. It is the case of disabled persons, unskilled workers or employees on probation or internship. Hence, for the employees

Who have been set individual performance objectives, the employer may take into account the extent to which they have been carried out in order to decide on dismissal for professional inadequacy.

- individual performance objectives are based on the fulfilment of work attributions/ duties from the job description by the employee holding that position. Therefore, if the job description is abstract, which does not consider the person occupying that position, the individual performance objectives are subjective, they focus on the employee's person<sup>19</sup>. Individual performance objectives usually address the employee's qualitative side of his/her activity, not the quantitative one<sup>20</sup>.

**f.** In assessing the employee's professional inadequacy, the jurisprudence holds that the employer must find that the elements, objective or subjective, justifying the employee's professional inadequacy must have a character of repeatability; it is not enough to retain an accidental mistake made by the employee<sup>21</sup>. Given that the legal text does not make a distinction, we appreciate that, exceptionally, the employer may take into account only one deed which proves the employee's professional incapacity to handle tasks.

**g.** Within the context of the provisions from the Criminal Procedure Code<sup>22</sup> on the preventive measure for judicial control (art. 211-215 from the Criminal Procedure Code) and judicial control on bail (art. 216-217 from the Criminal Procedure Code), we believe that the employee's professional inadequacy acquires a different content than the one existing so far. In the event that the judicial body who decided on judicial control requires, under art. 215 paragraph 2) letter e, Criminal Procedure Code, the defendant-employee's obligation, during this measure, is not to exercise his/her profession, job or not to carry out the activity under which it committed the deed, the employer may decide on his/her dismissal on grounds of professional inadequacy. The same obligation may be imposed under art. 217 paragraph 3) from the Criminal Procedure Code, and the defendant against whom, during prosecution, the prosecutor decided on judicial control on bail. To conclude, against the employee, defendant, found in one of the two preventive measure and who was imposed with the above-mentioned obligation, we believe that the employer may decide on his/her dismissal for professional inadequacy.

**B. a.** Art. 63 paragraph (2) from the Labour Code stipulates: "An employee's dismissal on grounds provided under art. 61 letter d) may be decided only after the employee's prior assessment, according to the assessment procedure set in the applicable collective labour agreement or, when there is none, in the internal regulations".

Regarding the flexicurity of employment relationships, the legislator did not expressly regulate the content of the employees' professional assessment procedure, but left it to the employer to implement the procedure in his unit. From the rigorous interpretation of the texts of the Labour Code [art. 17 paragraph (2) letter e, art. 63 paragraph (2) and art. 242 letter i], it results that the employees' professional assessment procedure must be included into one of the two specific sources of employment law: the applicable collective labour agreement<sup>23</sup> (which can be the one for

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<sup>19</sup>A.G. Uluitu, *Current regulatory solutions from the labour law necessary to be urgently revised by the legislator (Soluții actuale de reglementare din legislația muncii necesar a fi urgent revăzute de către legiuitor)*, in "Judicial Courier (Curierul Judiciar)" no. 2/2012, p. 95.

<sup>20</sup> See I.T. Ștefănescu, *Theoretical and practical treaty of employment law (Tratat teoretic și practic de drept al muncii)*, 3<sup>rd</sup> edition, revised and added, *loc.cit.*, p. 321.

<sup>21</sup>A. Țiclea, *Labour law treaty – Legislation. Doctrine. Jurisprudence (Tratat de dreptul muncii – Legislație. Doctrină. Jurisprudență)*, 8<sup>th</sup> edition, revised and added, *loc.cit.*, p. 768; I.T. Ștefănescu, *Theoretical and practical treaty of employment law (Tratat teoretic și practic de drept al muncii)*, 3<sup>rd</sup> edition, revised and added, *loc.cit.*, p. 444.

<sup>22</sup>Published in the "Romanian Official Gazette", part I, no. 486 from the 15<sup>th</sup> of July, 2010, with subsequent amendments and additions.

<sup>23</sup>The doctrine argued that the prior assessment procedure should be established at the level of the unit, solely by collective labour agreement, and only in its absence, the procedure can be determined by internal regulations. See Ș. Beligrădeanu, *Professional assessment carried out by the employer during the performance of the individual labour agreement (Evaluarea profesională efectuată de către angajator pe durata executării contractului individual de muncă)*, in "Law (Dreptul)" no. 6/2006, p. 120.

the unit, for the group of units or activity sector) or, alternatively, when it lacks, the internal regulations.

Within this context, the question arises whether the prior assessment procedure might be negotiated by an individual labour agreement or by an addendum to it. In this situation, a test case<sup>24</sup> is relevant where the employee's prior assessment procedure, as well as the assessment criteria were negotiated in the individual labour agreement, by an addendum to it. Compared to the imperative text under art. 63 paragraph (2) from the Labour Code, which stipulates that the prior assessment procedure, in case of dismissal for professional inadequacy, is set in the applicable collective labour agreement or, when it lacks, in the internal regulations, it currently cannot be accepted as being the legal solution to negotiating this procedure by the individual labour agreement. Hence, there cannot be a professional assessment procedure that lacks to be mentioned by one of the two specific sources of employment law and no procedure established by the individual labour agreement.

If one recognizes the principle of free will of the parties, the fact that a collective labour agreement was not concluded or it does not include the prior professional assessment or, although the employer has the right not to introduce this procedure in the internal regulations, it does not mean that its introduction in the individual labour agreement could not be negotiated directly with the employee. We believe that, normally, if the professional assessment procedure is not introduced in one of the two documents, the employer and employee should negotiate it in the individual labour agreement.

As a matter of fact, we consider that there should be a general provision in the Labour Code that would permit the individual employment agreement clauses to fix any problems that would otherwise be included in the applicable collective labor agreement, internal regulations or technical instructions for occupational safety and health<sup>25</sup>.

**b.** Unlike the hypothesis of disciplinary dismissal [art. 61 letter a) Labour Code] for which the legislator expressly regulated the content of the prior disciplinary investigation procedure [art. 63 paragraph (1) corroborated with art. 251, Labour Code], in the matter of prior professional assessment, the Labour Code does not comprise express regulations. Employee evaluations are usually carried out according to the employees' professional assessment criteria and procedures included in the internal regulations [art. 242 letter i), Labour Code] or according to the procedure set by legislation, if any.

We emphasize that until Law no. 62/2011 on social dialogue was adopted (which did not regulate the possibility of negotiating and concluding a unique national collective labour agreement), the professional assessment procedure was regulated in detail by the collective labour agreement at national level<sup>26</sup>. Subsequently, regrettably, the legislator did not take in the Labour Code the clauses from the unique national collective labour agreement concerning this procedure, which otherwise compensated the labour law rules. It would have been natural to have some guidance in the Labour Code on the content of this procedure, allowing the employer to detail rules and to include it in one of the two specific sources (the applicable collective labour agreement or, as applicable, the internal regulations). Moreover, it must be mentioned that for public servants, the professional performance assessment procedure is regulated by the Government Decision no. 611/2008 on the approval of rules concerning the organization and development of public servants' career<sup>27</sup>. Therefore, it is not reasonable that for civil servants there exists a legal regulation of this procedure, but there is none for employees.

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Conversely, in another opinion, which seems justified, it is natural that the legislator refers alternatively to the internal regulations as it is binding for all units. See,

<sup>24</sup> Civil decision no. 1066 from 05.04.2012 of the Court of Appeal from Timișoara, unpublished.

<sup>25</sup> If this proposal would be accepted, the legal text could be formulated as follows:

"If the applicable collective agreement, the internal regulations or the occupational safety and health instructions, as appropriate, do not include regulations set by law, they can be negotiated in the individual labour agreement". It might be included in the Labour Code under title II "Individual labour agreement", chapter II "Execution of the individual labour agreement", after art. 40.

<sup>26</sup> See C. Miheș, *The procedure of prior professional assessment (Procedura evaluării profesionale prealabile)*, in R.R.D.M. no. 2/2006, p. 42-44.

<sup>27</sup> Published in the "Romanian Official Gazette", part I, no. 530 from the 14<sup>th</sup> of July, 2008.

In practice, we consider that it should be started from existing parts in the last unique national collective labour agreement (2007-2010) and from the rules regarding civil servants when establishing the employees' prior professional evaluation procedure. Specifically, the procedure should include at least the following:

- the person/committee performing the professional assessment. By symmetry with the disciplinary investigation procedure [art. 63 paragraph (1) corroborated with art. 251 paragraph (2), Labour Code], the assessment may be carried out by a single person authorized by the employer. Still, it appears reasonable that the evaluation is carried out by a commission appointed by the employer which contains a union representative whose member is the assessed employee and, where appropriate, the employees' representative.
- determine how the professional assessment is made (theoretical and/or practical testing), and the assessment criteria. It is essential for the evaluation to be made in relation to the job description and the individual performance objectives, if they exist for the evaluated employee. The assessment should take into account all matters that depend on the employer's specific activity, the position filled by the employee, the activities carried out by the employee. In conclusion, this assessment must be objective, it must contain quantifiable elements, designed to eliminate the employer's subjectivity. The procedure ends with the elaboration of a professional evaluation sheets which assesses the employee's professional compliance/non-compliance. It is recommended that this sheet is signed also by the employee.
- the possibility of challenging the ruling of the professional inadequacy committee in a certain period<sup>28</sup>.

c. Another issue raised in practice was if in order to decide on dismissal for professional inadequacy, it is enough to have the unsatisfactory result of the fulfillment of work tasks by the employee obtained in the periodical evaluation (quarterly, biannual, annual), carried out according to the employees' professional evaluation criteria and procedures established by internal regulations [art. 242 letter I, Labour Code] or a distinct evaluation of the employee is necessary<sup>29</sup>.

From the corroborated interpretation of the provisions of art. 62 paragraph 1) [”If dismissal results for one of the reasons provided under art. 61 letters b)-d), the employer must issue a dismissal decision within 30 calendar days from the *date the cause of dismissal was found*” (s.n.)] with art. 63 paragraph 2), Labour Code [”The employee's dismissal for the reason provided under art. 61 letter d) may be decided *only after the employee's prior evaluation ...*” (s.n.)], we concur with the view<sup>30</sup> according to which a specific professional assessment is necessary, carried out with the purpose of identifying the cause of dismissal, of professional inadequacy. The argument is legal, art. 63 paragraph 2) being a *pro causa* text, the professional assessment being a mandatory condition for dismissal on grounds of professional inadequacy<sup>31</sup>.

Still, what if during the periodical evaluation, at predetermined time intervals by the internal regulations, or carried out untimely, the employee's professional inadequacy is found, is it rational for the employer to resume the professional assessment procedure (according to rules set in the applicable collective labour agreement or by internal regulations, as appropriate) in order to dismiss him/her? In other words, if the professional assessment is not carried out *pro causa*, cannot the finding of the employee's professional inadequacy attract his/her dismissal?

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<sup>28</sup>The unique national collective labour agreement for 2007-2010 provide the employee's right to appeal the decision of the professional inadequacy committee within 10 days from the notification of the decision of professional inadequacy. Iași Court of Appeal, labour litigation and social insurances department, decision no. 96/2010 – [www.jurisprudenta.org](http://www.jurisprudenta.org)

<sup>29</sup> Brașov Court of Appeal, civil division and for cases involving minors and family, labour conflicts and social insurances, civil decision no. 359 from the 31<sup>st</sup> of March, 2009.

<sup>30</sup> I.T. Ștefănescu, *Theoretical and practical treaty of employment law (Tratat teoretic și practic de drept al muncii)*, 3<sup>rd</sup> edition, revised and added, *loc.cit.*, p. 443.

<sup>31</sup> It was noted that: ”the mere reference to the provisions of art. 61 letter d) from the Labour Code as grounds for the termination of the labour agreement because of professional inadequacy is not capable of establishing the cause of the dismissal since the facts alleged by the appellee also contains references to disciplinary issues ...”. Ploiești Court of Appeal, labour conflicts and social insurances department, decision no. 52/2008, [www.jurisprudenta.org](http://www.jurisprudenta.org); Iași Court of Appeal, labour litigation and social insurances department, decision no. 150 from the 9<sup>th</sup> of February, 2010 – [www.jurisprudenta.org](http://www.jurisprudenta.org)

Under the current legal texts, professional evaluation should be distinct for the dismissal because of professional inadequacy. We consider that, in certain situations, the *pro causa* character of professional assessment is debatable. Therefore, if, to the extent that the employer carried out a periodical or ad-hoc professional evaluation and the evidence shows the total inadequacy of that employee, we appreciate that dismissal should be admitted under art. 61 letter d). In this context, we believe that for this dismissal, it could be either a *pro causa* professional assessment, or one resulted in the context of a general evaluation which led to finding the employee completely unfit professionally.

**d.** If, following the employee's prior assessment, his/her professional inadequacy is found, the employer may decide on his/her dismissal under art. 61 letter d), Labour Code. In this case, the employer must issue a dismissal decision within 30 calendar days from the date the cause of dismissal was found, according to art. 62 paragraph (1) from the Labour Code.

The 30 days run from the date the employer determines the cause of dismissal. The cause of dismissal may be the professional inadequacy, which is found when the authorized person or the committee entitled to perform professional assessments reaches the conclusion of professional inadequacy and submits it to the employer. According to art. 62 alin. (3) Labour Code, the decision is issued in writing and, under the sanction of absolute nullity, it must be motivated *de facto* and *de jure* and it must include details of the period within which it can be appealed and the court to be appealed in. The employer can formulate an appeal against the dismissal decision within 45 calendar days from the date it acknowledged the dismissal [art. 211 letter a) from Law no. 62/2011 on social dialogue]. The jurisdiction in the first instance to hear the appeal lies, according to art. 208 and art. 210 from Law no. 62/2011 on social dialogue, at the court in whose jurisdiction the applicant – employee resides or works.

If the employee has expressed written consent, within 3 working days of the communication by the employer, to fill a vacancy in the unit, compatible with vocational training, we appreciate that one cannot talk about the possibility of appealing the dismissal decision because from the interpretation of art. 64 paragraph (4) Labour Code, providing an available position in the unit is a measure prior to issuing the dismissal decision. The employer decides to dismiss the employee because of professional inadequacy if the employee does not manifest his/her consent within the prescribed period and after the notification of the case to the territorial employment agency (if the employer does not have any vacant positions in the unit corresponding with the employee's professional training).

We concur with the view<sup>32</sup> that the employer may revoke its dismissal decision for professional inadequacy until such time as a final judgment was pronounced and irrevocable decision to dismiss was maintained, as legal and thorough.

**C. a.** The public servant may be dismissed from public duty, according to art. 99 paragraph (1) letter d), of law no. 188/1999 regarding the Status of the Public Servant<sup>33</sup>, if there is incompetence due to receiving an "unsatisfactory" grade in the individual performance assessment. Professional training for civil servants is a legal obligation<sup>34</sup>, unlike existing rules that apply to regular employees. As a result, failure to do so implies the employee's fault. Professional incompetence is the only circumstance attributable to civil servants that can cause them to lose their job as covered by Art. 99 of the Law. Given that dismissal usually involves lack of public official negligence and incompetence of the civil servant assumes it's the public servant's fault, this case should have been regulated among dismissal situations regulated in art. 101 of Law no. 188/1999.

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<sup>32</sup>See I.T. Ștefănescu, *Theoretical and practical treaty of employment law (Tratat teoretic și practic de drept al muncii)*, 3<sup>rd</sup> edition, revised and added, *loc.cit.*, p. 488; A. Țiclea, *The employer's possibility to revoke the dismissal decision (Posibilitatea angajatorului de a-și revoca decizia de concediere)*, in R.R.D.M. no. 2/2014, p. 18.

<sup>33</sup> Republished in the "Romanian Official Gazette", part I, no. 365 from the 29<sup>th</sup> of May, 2007, with subsequent amendments and additions.

<sup>34</sup>Art. 50 of Law no. 188/1999 stipulates: "Public servants are entitled and have the obligation to continuously improve their skills and professional training abilities".

b. In contrast with the professional evaluation procedure for employees, the evaluating procedure for the individual performances of public servants is governed by the legislator, namely Government Decision no. 611/2008 for approving the rules on the organization and development of career civil servants (art. 106 – 120). The essential lines, in the case of public servants, for the individual performance appraisal procedure is as follows:

- it is carried out by an assessor in an interval from the 1<sup>st</sup> to 31<sup>st</sup> of January of the year following the period evaluated;
- the evaluated period is between the 1<sup>st</sup> of January and the 31<sup>st</sup> of December of the year for which the evaluation is being conducted; exceptionally, in cases established by art. 108 paragraph (3) H.G. no. 166/2008, the assessment is made during the period that is being evaluated;
- the evaluation tracks the extent and manner of achieving individual goals and the fulfillment of performance criteria;
- setting individual objectives<sup>35</sup> for civil servants is done by people who act as assessor, in relation to the public position they hold, professional degree, theoretical and practical knowledge and the abilities of the public servant [art. 110 paragraph (1)], and the performance criteria are set by Government Decision (Annex 5), depending on the specific activity of the department where the public servant operates;
- grading individual goals is based on the degree of attainment in relation to performance indicators and performance criteria in assessing the performance of its set individual objectives (1 Grade - minimum and 5 Grade - maximum); the final score is the arithmetic average of the annual assessment marks obtained for individual objectives and performance criteria (art. 113 of the Government Decision no. 166/2008);
- the stages in which the final evaluation is conducted are: completion of the evaluation report by the evaluator<sup>36</sup>, the interview<sup>37</sup> and countersigning of the assessment report (art. 114 of the Government Decision no. 166/2008);
- the final rating is determined by evaluation of the final grade, as follows: from 1,00-2,00 - unsatisfactory; between 2.01 to 3.50 - satisfactory; between 3.5 to 4.50 - well; between 4.51 to 5.00 - very good;
- the evaluation report is submitted for countersigning to a person who is, according to the organizational structure of public authority or institution, usually a public servant superior to the evaluator; if the evaluator is head of the authority or institution, the evaluation report doesn't need to be countersigned;
- the appraised civil servant, who is dissatisfied with the outcome of the evaluation, can appeal to the head of the authority or institution within 5 days of becoming aware of the received grading and the appeal must be resolved within 15 days after the deadline for appeal submissions; the public servant is notified about the result of the appeal within 5 calendar days from solving the complaint - art. 120 paragraph (1-3) of the G.D. no.166/2008.

By analogy with the evaluation procedure professional civil servants undergo, private sector employers might consider these rules and include them in the applicable collective work agreement or, in the internal rules, where an agreement does not exist.

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<sup>35</sup>According to art. 111 of G.D. no. 166/2008, individual objectives must include the following requirements: " a) to be specific for the activities which entail exercising public power prerogatives; b) are quantifiable – to have a particular means of carrying out; c) to be provided with deadlines; d) to be realistic – to be carried out within the provided periods and with the allocated resources; e) to be flexible - to be reviewed in the light of changes in the priorities of the public authority or institution". For each of the set objectives, the evaluator sets the performance indicators.

<sup>36</sup> The model for the public servants' individual professional performances is provided in Annex 6 from G.D. no. 166/2008. In this report, the evaluator: a) sets the final grade of individual performance appraisal; b) records the public servant's outstanding results, objective difficulties met by him/her in the evaluated period and any other observation which he considers relevant; c) establishes training needs for the year after the evaluated period; d) sets individual objectives for the year after the evaluated period (art. 115 from G.D. no. 166/2008).

<sup>37</sup>The interview consists of an exchange of information that occurs between the evaluator and the civil servant, in which: a) the civil servant is notified by the evaluator regarding the records in the evaluation report; b) the evaluation report is signed and dated by the evaluator and the appraised public servant [art. 116 paragraph (1) from G.D. no. 166/2008].

c. The civil servant dissatisfied with how the complaint was resolved and the one that was directly assessed by the head of public authority or institution can, in accordance with the law, address their issues to an administrative court of law. An analysis of art. 106 of Law no. 188/1999 regarding the status of civil servants, republished, with art. 11 of Law no. 554/2004 on administrative litigation<sup>38</sup>, with subsequent amendments and additions, the public servant may challenge the administrative act of dismissal on the grounds of professional incompetence within 6 months of receiving the response to a prior complaint or, if applicable, the date of communicating the refusal, that was considered undue, to settle the complaint. If the case of the unilateral administrative act, the application may be introduced, for exceptional reasons, after the 6 months period, but not later than one year from the document's issue date. The court competent to hear the appeal is, on the substance, the court's administrative litigation department in whose territorial jurisdiction the applicant resides or where the registered office of the defendant is.

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<sup>38</sup> Published in the "Romanian Official Gazette", part I, no. 1154 from the 7<sup>th</sup> of December, 2004.