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### THE COMPENSATION OF THE EMPLOYER IN THE FIXED-TERM CONTRACT (A STUDY IN THE JORDANIAN LAW)

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#### **Abstract**

This research addresses the employer's compensation in the fixed-term employment contract by investigating the definition of a fixed-term employment contract, the elements of the contract of employment, and the employer's compensation for the termination of the fixed-term employment contract by the employee in cases other than those stipulated in Article 59 of the Labor Law. Research Importance: Given the importance of the labor law and the development of legislation governing the relationship between the two parties, "the employee" and "the employer", to reach a balance Regarding the rights and obligations of the two parties Research Methodology :The descriptive approach was followed by comparing legal texts from legal books, laws and legislations related to the topic, legal applications and the jurisprudence of the Court of Cassation on this matter In addition, the consensual compensation and / or the penalty clause as well as the extent of its importance and impact if it existed in a fixed-term employment contract were discussed.

#### **Introduction**

This research addresses an important topic related to the employer's compensation for the damage caused by the employee's termination of a fixed-term employment contract in cases other than those stipulated in the text of Article 26 / b of the Labor Law. Moreover, it clarifies the importance and efficiency of the penalty clause "Consensual compensation" in the employment contract, its legal implications, and the extent of its incompatibility and agreement with Article 26 / b of the Labor Law. Therefore, this issue was investigated due to its importance. The research is divided into two chapters which will be subsequently clarified. Research Importance are Given the importance of the labor law and the development of legislation governing the relationship between the two parties, "the employee" and "the employer", to reach a balance Regarding the rights and obligations of the two parties. However, lawsuits are increasing between the

two parties and in a remarkable manner. Through examining research and studies related to the labor law and its provisions, it was found that most of them relate to the rights of the employee and focus on his interest more than that of the employer as the articles on the rights of the employer were brief and require conditions for their realization in addition to imposed restrictions and limitations. Article 26 / b of the Labor Law is one of the articles that address the rights of the employer, the compensation for the damage that the employer is entitled of as a result of the employee's termination of the fixed-term employment contract. Furthermore, after examining articles of law and jurisprudence, it was found that there are conditions and restrictions for this compensation, in addition to the existence of a contradiction between different jurisprudence with regard to compensation for the employer. Thus, it was necessary to research this issue due to its legal importance. Research problem: In light of the development of economic life in general and in the industrial and commercial fields in particular, it is evident that this is accompanied by development in legislation including the labor law, but it has been found that there are shortcomings in some articles that regulate the relation between labor and the employer, especially with regard to the rights of the employer to obtain compensation in the event of an employer's breach of contract or contradictions in jurisprudence in some cases due to the lack of clear and decisive articles on this matter. Thus, a problem arises regarding determining the rights of the employer in the event of the employer's termination of the fixed-term employment contract, and the extent of the penalty clause and / or the consensual compensation's importance, which in some cases are considered as if it did not exist despite it being a consensual condition stipulated in the law. The ambiguity and implications of that on judicial applications and their differences, and the existence of contradictory judicial decisions and jurisprudence on the same issue called for addressing this problem. The objectives of the research are as follows:

- Most of the studies and research dealt with the rights of the employee and not the employer in terms of compensation and the implementation of the penalty clause / consensual clause in the event of a clear breach by the employee.
- To shed light on this issue and indicate its importance to reach clear and fixed legal regulations that guarantee the right of the employer to compensation. Also, to guarantee and emphasize the rights of employees in order to achieve a balance between the interests of the two parties which result in serving the public interest.
- To investigate the important aspects of this topic in a scientific and practical manner, as well as to examine applications and jurisprudence through legal texts and relevant case-law. Research Methodology: The descriptive approach was followed by comparing legal texts from legal books, laws and legislations related to the topic, legal applications and the jurisprudence of the Court of Cassation on this matter. Accordingly, the research is divided into two chapters as follows:

The first chapter: the definition of contract of employment. It includes the definition of contract in general, followed by the definition of the contract of employment, and finally the elements of contract of employment

- The second chapter: compensation, it is divided into sections discussing the consensual compensation and / or the penalty clause in general, the compensation to the employer in the event of a breach or termination of fixed-term employment contract by the employee and its conditions, and the penalty clause in the fixed-term employment contract.

## **Literature review**

### **The definition of an employment contract**

Before defining an employment contract, the contract must be defined in general and briefly

#### **First: Definition of “contract”**

It is known that the contract is one of the most important sources of obligation. However, scholars' definitions of contract differed as some of them distinguished between the contract and the agreement. The agreement, according to their opinion, is the agreement of two individuals or more to establish, transfer, amend or terminate an obligation. While the contract is more specific than the agreement. An agreement is not considered a contract unless it establishes or transforms an obligation . If it modifies or terminates an obligation, then it is not considered a contract.<sup>1</sup>

The French civil law adopted the distinction between a contract and an agreement from Pottet and Dorma, It defined the contract in Article (1011) as an agreement whereby one or several persons are obligated to one or several other persons to give something, do something or to refrain from doing something.<sup>2</sup>

The Jordanian legislator defined the contract clearly and without distinguishing between the agreement and the contract, as Article (819) of the Civil Code stipulates the following: “A contract is an obligation initiated by one of the contracting parties and is accepted by the other which includes the agreement between them in a way that will have an effect on the contracted upon and entails that each party commits to fulfilling their obligations to the other.

In any case, it is noted that the contract is an agreement of two parties to establish reciprocal obligations according to the type of contract and its divisions, which shall not be discussed in this research, but it was necessary to address the definition of the contract in general as an introduction to the definition of the employment contract.

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<sup>1</sup> Attorney Dr. Yaqoub El-Far / Sources of obligation / First Edition, p.27

<sup>2</sup> Dr. Abdel Razek Al-Sanhouri , The Mediator in Explaining the New Civil Law, Volume One, p. 137

## **Second: Definition of “Contract of employment”**

After researching the contract of employment it was found that it is a type of specific contracts and it is known that the legal regulations that govern specific contracts are complementary or interpreted and not peremptory norms. In order to define an employment contract as one of the specific contracts that result in a benefit, it is also necessary to address the elements of an employment contract that are included in the definition of the employment contract.

There are many definitions for the employment contract, and they are all similar in terms of the outcome. Some of them define the employment contract as a contract according to which a person places his professional activity at the disposal of another person to work willingly and for his benefit in return for a wage.

According to another definition, it is a contract in which one of the contracting parties works for the other contractor and under his management and supervision in return for a wage.<sup>3</sup>

The Jordanian civil law defined the employment contract in Article (605) as: “1- A contract by which one of the two parties is obligated to work for the benefit of the other under his supervision or management in return for a wage.

2. As for if the employee is not restricted to work only for the employer, or if the work duration is not determined, the agreement is not considered a contract and he is entitled only to the wage according to the agreement.

Furthermore, the Labor Law defined the work contract in Article 2 as “an explicit or implicit verbal or written agreement whereby the worker undertakes to work for the employer under his supervision or management in return for a wage. The employment contract is for a limited or unlimited period of time or for a specific or unspecified job.

Based on the definition of the employment contract in the Jordanian Labor Law, it was found that two elements must be present:

## **Third: Elements of contract of employment**

1- The subordination component

2 - The wage component

Based on the above and according to my point of view, the duration element should be one of the elements of a fixed-term employment contract.

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<sup>3</sup> 1- The Mediator in Explanaing of the Jordanian Civil Law - Part VII , 2001 Page (4-5) , supervised by Hassan Al-Fakhani - Dr. Abdel-Basit Homsî, Professor Abdel-Moneim Hosni, Dr. Muhammad Salam, Mathkour Al-Ustath Adel

Moreover, the definition of the employment contract in the Jordanian Labor Law, stated that the employment contract could be for a limited or unlimited period of time and for a specific or unspecified job.

Since my area of research is the compensation of the employer in the fixed-term employment contract, it is necessary to address the fixed-term work contract before moving on to the second chapter, which is on compensation, and an employment contract is considered fixed if a specific date is set for it to expire.<sup>4</sup>

The duration is determined by agreement, whereby the employer and the employee may specify in their contract a specific date in which the contract between them ends or specify that the work relationship between them is to last for a specific period of time. The duration component is considered one of the elements of the contract that is independent of the wage component as the type of contract whether fixed-term or indefinite is not determined by the manner in which the wage is paid.<sup>5</sup>

Article (805) of the Civil Code stipulates the following:

'1- The employment contract may be for a limited or unlimited period of time for a specific job.

2- Its period may not exceed five years, and if a contract is made for a longer period of time, it is modified to five.

Article (15/1 / b) stipulates the following: "An appointed employee for an unlimited period of time is to presume his work until his service ends according to the provisions of this law. In cases the employee is appointed for a specific period of time, he is to carry on his work during that period."

Article (15/1 /c) stipulates the following: If the employment contract is for a limited period of time, it expires by default by the end of its duration. If the two parties continue to implement it after expiration, it shall be considered a renewal for an unlimited period from the beginning of implementation.

However, if the contract is originally a fixed-term contract but includes a condition that entitles each of the contracting parties to terminate it by simply notifying the other party at any time before its expiry then it is considered an indefinite contract.<sup>6</sup>

It is known that a fixed-term employment contract has a fixed term that ends with the end of the specified period, but if the implementation of the

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<sup>4</sup> Lawyer Dr. Mansour Ibrahim Al-Atoum / Explanation of Labor Law / First Edition 2017 p. 128

<sup>5</sup> The Mediator in Explaining the Jordanian Civil Law - Part Seven, 2001 Page (21) Supervised by the counselor Hassan - Dr. Abdel Basit, Prof. Abdel Moneim Hosni, Dr. Muhammad Salam, Prof. Adel

<sup>6</sup> Attorney Dr. Mansour Ibrahim Al-Atoum / *ibid.*, Page 129

contract continued after its expiry, the contract becomes indefinite in accordance with Article 15 / c of the Jordanian Labor Law.

Accordingly, the employment contract is considered a fixed-term contract if it is clear and specific to the two parties and produces its legal effects, including the conditions it contains.

Nevertheless, the questions here are whether the fixed-term employment contract includes a consensual compensation for the employer or a penalty clause in case the employee breaches the terms and/or clauses of the contract. In this case what is the extent of validity of this compensation, what is the extent of its binding nature and enforceability, what are the conditions and / or aspects of adherence to it, what is Compensation due and / or due to the employer. These questions will be addressed in the second chapter.

Before addressing the compensation which the employer is entitled of, it is necessary to discuss the definition of compensation in general.

In the hadith of Abu Huraira, when God permitted that for the Muslims, “referring to the tribute, they knew that he had compensated them better than what they feared to lose. It is said: I compensated, meaning that provided a substitute for what was lost. In the Hadith the phrase (and the future) has been repeated as the future refers to the compensation.

From the above definitions, we can conclude that compensation in the law is reparation and removal of the damage arising from civil liability and restore the state of the one who was harmed to how it was originally before the damage.

### **First: Consensual compensation and / or penalty clause**

Definition of the penal clause:

The term penal clause is like other legal terms for which many definitions can be found due to the legal scholars' different views on this subject, and with reference to the Jordanian civil law, the Jordanian legislator did not provide a definition of the penal clause, which prompted scholars to define it. For example, Dr. Suleiman Markus defined it as "an agreement whereby a person is obligated to take a certain action - usually to pay an amount of money - in the event that he breaches an original commitment or if there were delays in fulfilling that original obligation as a penalty for this breach and compensation to the creditor for the damage inflicted on him as a result of that."<sup>7</sup>

Professor Zuhdi defined it as "It is the compensation that the two contracting parties stipulate in the contract and estimate by themselves in

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<sup>7</sup> Suleiman Markus / Summary of Due Process / Arab Statement Committee Press / Cairo / 1961 / P. 675

case the obligation is not fulfilled or when there is a delay in the fulfillment.<sup>8</sup> While, professor Dr. Abdul Razzaq Al-Sanhouri defined it as: "The compensation that the contracting parties estimate in advance instead of leaving it to the judge which the creditor is entitled to if the obligor does not fulfill his obligation, thus this compensation is due to the unfulfillment, of obligations, or they may agree on the amount of compensation due in the event of the obligor's delay in carrying out his obligation as such this compensation is due to the delay in fulfillment."<sup>9</sup> This agreement in advance on compensation is called a penalty clause.

The Jordanian civil law did not distinguish between the consensual compensation and the penal clause, since the agreement to estimate compensation is called the penalty clause, the two contracting parties may agree in advance or subsequently on the amount of compensation that the creditor is entitled to in the event that the obligor does not fulfill his obligation or if there was a delay in fulfilling that obligation on time. Article (364 /1) of the Civil Code stipulates: "The contracting parties may specify in advance the value of the guarantee by including it in the contract or in a subsequent agreement, taking into account the provisions of the law."

It is noted from the above that it is permissible to agree in advance on the amount of compensation in the event of a breach or delay in fulfillment, either in the contract itself, which is initially signed between the two parties, or through a subsequent agreement.

The jurisprudence of the esteemed Court of Cassation considered the penalty clause as a type of compensation.<sup>10</sup>

It is noted in the first paragraph of Article (1/364) of the civil law referred to above that that this agreement is permissible with regard to the two obligations (that is, the contract terms and the responsibility for the harmful act). The inclusion of penal clause has increased in many contracts these days, such as in the fields of contracting and factories and various companies ... etc.).<sup>11</sup>

Especially since there is a necessity or an urgent need to hire some workers or employees because of the knowledge, skills and experience they have. Moreover, some of them do not have the required educational qualification

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<sup>8</sup> Zuhdi Yakan, Explanation of the Law of Obligations and Contracts with Comparison with Modern Laws and Islamic Law, part.5, Al-Maktabah Al-Asriyah Publications, Saida ,Beirut, p. 135

<sup>9</sup> Dr. Abdel-Razek Al-Sanhouri / Mediator in Explaining the New Civil Law / Part Two / The General Theory of Obligation / Evidence / Effects of Obligation / Al-Halabi Legal Publications / Beirut Lebanon / p. 851

<sup>10</sup> 1- The decision of the Jordanian Court of Cassation in its legal capacity No. (3722 / 2004), a five-member body, dated 27/1/2005.

<sup>11</sup> Dr. Salah al-Din Abd al-Latif - The provisions of obligation published in the Jordanian Bar Association journal (special Annex no. 19).

but have rare or not always available technical experience, such as in some large factories that need specific technical expertise to conduct their business. In this case, the employer resorts to setting a large penalty clause to ensure that the employee continues to work and does not leave when it is difficult to find an alternative. In addition to that some scientific and academic specializations are important for several reasons, including that employers need them for work purposes, and the fact that these specializations are compulsory requirements for the competent authorities such as universities as they are regarded accreditation requirements for a specific major or absorptive capacity.

Thus, the penalty clause as a consensual compensation is only conceivable for breaching the obligations that arise from the legal disposition within the framework of the contract and the implementation of the compensation if the source is other than the contract such as a harmful act, is very rare and is called the penalty clause because it is an amount of money paid by the debtor as compensation to the creditor.<sup>12</sup>

It is noted from the foregoing the importance of the penalty clause in the working life, especially that the penalty clause since an agreed compensation in the event of the debtor's breach of his commitment or delay in the implementation would urge the him to fulfill his commitment for fear of being bound by the consensual compensation, which often entails paying more than the real harm and at the same time, it would relieve some creditors from the burden of proof, since the damage in the event of breach is considered presumptive, and for this reason, most contracts and agreements in our time are not without the penalty clause or consensual compensation due to their various advantages and benefits, both private and public.<sup>13</sup>

The advantages of the penalty clause:

A- Avoiding disputes over proving the amount of damage in the future.

B – Exempting the creditor from proving that the damage has occurred meaning that the damage is presumed so that the creditor is exempt from proving it. Perhaps the importance of the penalty clause is that it makes the damage actually presumptive and it is considered a rebuttable presumption.<sup>14</sup>

C- If it is moderate, it reduces the debtor's liability.

D - Ensuring the fulfillment of the obligation, which is one of the most important advantages that the penal clause achieves. Agreeing on it makes the debtor implement his obligation in the required manner without

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<sup>12</sup> Dr. Yasin Muhammad Al-Jubouri, Al-Wajeez in Explaining the Jordanian Civil Law, the Penal Clause, The Advantages and Disadvantages, 2nd Edition, p.230

<sup>13</sup> Dr. Salah El-Din Abdel-Latif, Same source, p. 81,

<sup>14</sup> Recognition of Rights No.582 /91 of the Bar Association Journal, p. 737 to 1993



prejudice because he knows in advance that he is liable to compensate the creditor for the damage he will suffer as a result of non-implementation.

While the disadvantages are:

The overestimation of the compensation and the binding force of the contract, however it remains the court's decision to approve the permissibility of amending the penalty clause at the request of the parties.

Before discussing the consensual compensation or the penal clause in employment contracts and the judicial applications in this regard, it must be pointed out that the Jordanian law considers damage a pillar of the penal clause, thus this judicial decision is not issued unless he is harmed, meaning that the law and jurisprudence consider the harm which has occurred and does not take into account the presumed harm, as Article 364/2 of the Civil Code stipulates: "The court may, in all cases, upon the request of one of the parties, amend the contract in such a manner as to make the assessment equal to the damage, and any agreement that contradicts that is null and void.

### **Second: Compensation to the employer in the event of termination of the fixed-term employment contract by the employee**

In the beginning of the research, compensation was introduced in general and in a brief manner as well as the importance of the penalty clause as an agreed upon compensation in the event of the debtor's breach of his obligations or if there was a delay in the implementation. Also, the importance of this consensual compensation in civil obligations.

There is no dispute on this in civil obligations and the jurisprudence is in accordance with the civil law and with Article 364/1, which stipulates the following:

The contracting parties may specify in advance the value of the guarantee by stipulating it in the contract or in a subsequent agreement, subject to the provisions of the law.

Whereas, the labor law stipulated a provision related to compensation to the employer in the event that the employee leaves work before the end of the period specified in the fixed-term employment contract, as Article 26/ b of the labor law stipulates the following:" If the termination of the fixed-term contract was made by the employee in cases other than those stipulated in Article (29) of this law, he may claim the damages that arise due to this termination which is estimated by the competent court, provided that the amount does not exceed half the wage the employee received each month for the remaining period of the contract.

Based on the aforementioned article, it is evident that the employer has the right to claim a compensation for the damage caused due to the termination of the employment contract by the employee, which is assessed by the competent court, provided that it does not exceed the wage of half a month for the remainder of the contract period.

It is clear that the Labor Law in the aforementioned article has set the maximum limit for compensation and has given the authority and discretionary power to the judge to estimate the compensation according to the aforementioned maximum or less than that, but it may not exceed that limit, out of consideration to the employee as he is considered the vulnerable party. Compensation owed to the employer is for the damage that the employee actually inflicted as a result of leaving work without justification, and the court assesses its amount, provided that it does not exceed half a month's wages for each of the remaining months of the specified period.

This means that the compensation owed to the employer in the event that the employee leaves his work without a justification would increase and may decrease according to the damage inflicted on the employer.<sup>15</sup>

#### **Conditions for employer compensation:**

It is clear from the text of Article 26 / B of the Jordanian Labor Law that there are conditions and restrictions that must be met in order to compensate the employer, which are:

A- If the termination of the fixed-term employment contract takes place by the employee in cases other than those stipulated in Article (29). Accordingly, the termination of the fixed-term employment contract is considered illegal on the part of the employee, should none of the cases mentioned in Article 29 in the Labor Law be applicable which stipulates: (The employee has the right to leave work without notice while preserving his legal rights and to receive compensation for inflicted damage upon termination of service in any of the following cases:

A. If the employee was assigned in a position that differs significantly from the one agreed upon in the employment contract, provided that the provisions of Article (17) of this law are taken into consideration.

B. Using the employee in a manner that calls for changing his permanent place of residence, unless the contract stipulates that this is permissible.

C. Transferring him to another job at a lower level than the job agreed to in the contract.

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<sup>15</sup> Mediator in explaining the labor law, Dr. Syed Mahmoud Ramadan , P.443 -444

D. Reducing his wage, provided that the provisions of Article 14 of this Law are taken into consideration

E . If it is proven by a medical report issued by a medical authority that continuing to work would threaten his health.

F. If the employer or his representative assaulted him during work or because of him, by beating or degradation.

G. In case he receives a notice from a competent authority in the Ministry requesting to adhere to these provisions, as it is considered legitimate to terminate the employment contract by the employee if one of the aforementioned cases was present and that is in accordance with Article (29) which gives him the right to leave work without notice while retaining his labor rights.<sup>16</sup>

B- If the termination results in harm or damage

The legislator has required the existence of actual harm to the employer in order for the worker to be liable for compensation.

The immediate damage is the damage that has actually occurred, and the basic principle is that compensation is for the immediate damage, but if no damage occurs in the first place, then there is no compensation .<sup>17</sup>

Jurisprudence defines damage as the harm that befalls a person regarding one of his rights or his legitimate interest, whether that right or interest has a financial value or not.<sup>18</sup>

The material damage is a breach of the interest of the one subject to the damage that has a monetary value, and this breach must be realized as it is not sufficient that it is likely to occur or not.<sup>19</sup>

The burden of proving damage falls on whoever demands it, In this case, the employer. The damage is not assumed just because the employee has terminated the employment contract, as the harm is not assumed just because the debtor has not fulfilled his contractual obligation. Thus, it is

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<sup>16</sup> The mediator's reference in explaining the labor law, Dr. Sayed Ramadan - p. 432

<sup>17</sup> Al-Waseet in Explaining Civil Law / Sources of obligation / Part One / Abdul-Raziq Al-Sanhouri, p. 687-688

<sup>18</sup> Suleiman Markus / Al-Wafi in Explaining Civil Law, p. 552

<sup>19</sup> Al-Waseet in Explaining Civil Law / Sources of obligation / Part One / Abdul-Raziq Al-Sanhouri, p. 855

possible that the debtor may not fulfill his obligation and the creditor is not harmed by that.<sup>20</sup>

The creditor is the one who claims that the debtor has not fulfilled his obligation and because of that he is demanding compensation, thus the burden of proving that the debtor has not fulfilled his obligation is on the creditor. If this is proven, then it is considered a breach of the contract as we mentioned earlier. Moreover, since the creditor has to prove the damage and the causal relationship between the breach and damage, when he achieves that it indicates that he has provided the proof, and is entitled to compensation. This is unless the debtor denies the presumed causation by proving the force majeure.<sup>21</sup>

### **C- The causal link between termination of the employment contract and the damage**

The burden of providing proof: It is not sufficient that there was a mistake and damage, the error must be the cause of the damage, that is, a causal relationship between the error and the damage exists, as the error might be on the part of the debtor. There may also be damage inflicted by the creditor without that error being the cause of the damage.

It is assumed that the causal relationship between error and damage exists, so the creditor is not required to prove it. Rather, the debtor is the one who has to deny this relationship if he claims that it does not exist, so the burden of providing a proof lies on him and not on the creditor.

It is evident from the foregoing that causation exists apart from error, and the element of causation is considered unavailable while the error remains if the damage is not due to the error.<sup>22</sup>

Based on the aforementioned and in light of Article 26 / b of the Labor Law, the aforementioned conditions must be met in order for the competent court to estimate the appropriate compensation for the employer. It is possible for the court not to award any compensation if the damage is not proven or if one of the conditions mentioned above is denied.

### **Third: the penal clause in the fixed-term employment contract**

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<sup>20</sup> Ibid, p. 679

<sup>21</sup> Al-Waseet in Explaining Civil Law / Sources of obligation / Part One / Abdul Raziq Al-Sanhouri, p. 660

<sup>22</sup> Al-Waseet in Explaining Civil Law / Sources of obligation / Part One / Abdul Raziq Al-Sanhouri, p. 687- 688

After discussing the penalty clause or the consensual compensation in general, it is necessary to address the penalty clause in the fixed-term employment contract

Especially since determining the period in the contract achieves reconciliation between two conflicting considerations, which are protecting the freedom of the employee and the desire at the same time to protect the contracting parties, in particular the employee in order to provide some degree of stability to the contract.<sup>23</sup>

In light of the importance of fixed-term employment contracts for the two parties, the employee and the employer in many cases, and in order to achieve a balance between their interests as well as an economic balance, it is necessary to be aware of the importance of the penalty clause in employment contracts.

### **1- Freedom to contract:**

There is nothing in the law, as a general rule, that prevents the parties from agreeing on any conditions in the interest of the two parties, including the penalty clause. It is noticed that there is a multiplicity of opinions and jurisprudence, as they differed regarding the inclusion of penalty clause in the employment contract and the conditions for its application in the event of its existence.

It is well known and recognized that the contract is made according to the (*pacta sunt servanda*) principle, and it must be executed according to the terms it includes in a manner consistent with good faith in accordance with Article 202 of the Civil Code.

Whoever seeks to violate his part, his efforts are rejected according to Article 238 of the Civil Code.

In addition to the principle of free will and the freedom to contract as long as the contractor is of full legal capacity and has free will, without any impediments to legal competence.

The bases of obligations is free will, as well as the implications of obligations as they are also subject to the will. Thus this base has two aspects: First, the employee who contracts with the employer freely and voluntarily must fulfill the agreed upon obligations, and cannot argue that the terms he agreed to are unfair. Second, it is not important in the contract that there be a parity between the two reciprocal things, rather it is sufficient for the two contracting persons to be equal with each having freedom and autonomy of will. The basic principle for people is freedom and autonomy of will with no exceptions unless within the limits established by law, such as if the contractor is a minor, insane, or a victim

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<sup>23</sup> Al-Waseet in explaining the Jordanian civil law, Dr. Abdul Basit / *ibid.* , p.25

of error, coercion, or fraud. Apart from these cases a person is considered to have freedom and autonomy of will.<sup>24</sup>

### **The extent of acceptability of the penalty clause in fixed-term employment contracts from both legal and judicial perspectives:**

#### **A- From the legal perspective:**

Article 26/ b of the Labor Law stipulates the following: "If the termination of a fixed-term contract is made by the employee in cases other than those stipulated in Article (9) of this law, the employer may demand compensation for the damages that arise from this termination which is estimated by the competent court, provided that the amount of the compensation to be paid by the employee does not exceed half a month's wages for each month of the remaining period of the contract.

That is, the Labor Law has taken into account the principle of compensation to the employer in the event that the worker terminates a fixed-term employment contract to compensate the employer for the inflicted damage, provided that the estimation is made by the competent court, and that it does not exceed half a month's wage for each of the remaining months in the contract.

In other words, if the damage and harm are much greater than what is stipulated in Article 26/ B, the court is bound by the aforementioned article.

In the light of this article, it is clear how important the penal clause is if the interest of the employer lies in fixed-term employment contracts.

It is noted and in my opinion that the text of Article 26 / b of the Labor Law contradicts the principle of free will.

Article 819 of the Civil Code stipulates: "'If the two parties agreed to a large imposed amercement in case the employee breaches the non-competition agreement, with the intention of forcing him to keep working for the employer, the term is invalid.

Article 819 addressed the subject of including a condition of non-competition in the contract, freed from time and place restriction, that is, absolutely without any restrictions. Also, the article nullified the suspension of this condition because it was specially designed to protect the employer but to the extent necessary to protect him and to protect his legitimate interests without abuse or exaggeration in the restrictions. As such, a contract is nullified if it includes, for example, a penalty clause in the event of breaching it. This condition is considered an exaggeration which can be used to force the employee to keep working in the employer's industry, trade or cultivation for a period longer than what was agreed upon. This matter is common when the employee has a long experience and skills, has a rare specialization, or the type of work that he performs is not known, as a result the employer attempts to establish a contract in a manner that makes

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<sup>24</sup> Al-Waseet in explaining the new civil law , sources of obligation , ibid ,part one, p. 145

it difficult for the employee to resile from and at the same time be satisfied with its content. For this reason the legislator takes precautions and nullifies any contract if its conditions were exaggerated.

It was stated in the explanatory memorandum of the civil law that the two parties may agree on conditions that secure their interests provided that the agreement does not include obliging the employee to pay a large amercement with the intention of forcing him to stay, as this indicates that his consent is tainted by coercion, and therefore the condition is considered invalid pursuant to the three Madhhabs Maliki, Shafi'i and Hanbali.

It is noted, through researching the subject of the penal clause or the consensual compensation, that in the event that a penalty clause or consensual compensation is included, the damage is presumed in relation to civil obligations and contracts, and the debtor must prove that the damage did not occur, while in employment contracts, the damage is not presumed, rather it must be proved and the burden of providing evidence falls on the employer.

## **Results**

Through this modest research it was found that there are shortcomings in the articles that regulate the relationship between the employer and the employee, especially with regard to the compensation which the employer is entitled of in case the employee terminates the fixed-term employment contract, especially if the penalty clause is included in the contract. In light of these shortcomings, the jurisprudence of the esteemed Court of Cassation differed in determining the compensation owed to the employer, as some of the jurisprudence took the consensual compensation in the fixed-term employment contract into consideration while others did not.

Given the importance of this issue, especially with the development of practical, industrial, commercial and educational life in all respects, it became necessary to achieve balance between the interest of the employer and the employee, and not focus constantly only on the interest of the employee as the weaker party as he may exploit this for his own benefit and cause damage to the employer, especially since there is a necessity and urgent need for the employees who have specialized knowledge, experience and skills as well as for those who have rare or not always available technical expertise, such as in some major factories that require specific technical expertise to function. Therefore, in this case the employer resorts to include a penalty clause to ensure that the employee will continue to work during the period of the fixed-term contract and will not leave work at a time when it is difficult to find an alternative easily. In addition, some specializations are considered as mandatory requirements for the competent authorities such as universities and accreditation requirements.

Therefore, the researcher finds it necessary to amend the labor law in accordance with the interest of the employer and the employee alike, given that some employers have large projects and businesses that are in the public interest which require protection of the employers' rights as I have

not found enough clear provisions regarding this area, especially since there are differences in the jurisprudence on this matter.

### **Recommendations**

Through this brief and humble presentation of the research topic “ The compensation of the employer in a fixed-term employment contract”, the researcher was able to come up with the following recommendations:

1- To introduce clear provisions and amend the labor law regarding compensation to the employer in fixed-term employment contracts because of their importance, especially that the motif to utilize these contracts in most cases is the fact that it takes into account economic interests related to the project or facility with which the employee contracts in a manner that achieves balance and equality in the interests of the two parties, and settles the difference of jurisprudence in this area so that there is no conflict or contradiction in the jurisprudence or conflict of laws.

2 - That the penalty clause included by the employer be applied according to the (*pacta sunt servanda*) principle, and the principle of free will, as long as the contract is established with full legal capacity without any objection or illegal purpose, so that the absence of the penalty clause is not used by the employee to evade his obligations for the purpose of achieving a certain interest or give priority to his interest over the interest of the employer.

3- To amend the law so that the compensation of the employer is defined by the law and in a just manner that takes into account the interest of the employer and the employee alike. As such the provision would compensate the employer with a half a month's wage for the remainder of the contract period without leaving the matter permissible for the court and its discretionary power. Accordingly, balance is taken into account for the interest of both parties. Although this amendment would be in the interest of the employee, since a violation by the employer entails more rights for the employee than for the employer in case the violation is made by the employee.

4- To avoid loopholes that lead to the weakening of the penalty clause by applying it as agreed upon by the contracting parties regardless of the compensation value and also, to compare it with the damage caused by the failure or delay in implementation in accordance with the (*pacta sunt servanda*) and freedom of contract principles. Furthermore, to give necessary force to the clause and to respect the principle of free will and balance in the interest of the parties of the contract, especially since most of the laws and jurisprudence give priority to the interest of the employee without addressing the interest of the employer in depth despite the fact that some projects require the protection of the interest of the employer and the employee in a balanced manner.

5- To amend the text of Article 26 / B of the Labor Law by awarding compensation more than the amount stipulated in Article 26 / B and / or authorize ruling with the penalty clause or in accordance with Article 26/



B, whichever is more without specifying the maximum limit stated in Article 26 / B

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