A View on ECHR Case law for Salary Policy in Romanian Public Sector

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Abstract: As theeconomies of other countries in Western Europe, the Romania's economy went through a very difficult period because of the international financial crisis, with GDP falling by over 18%. In the situation of no longer being able to meet its payment obligations and under the pressures of international financial organizations, the Romanian government opted for the radical measure of cutting public sector wages by 25%. Faced with this unprecedented action of country administrative power representatives, the Romanian civil servants attacked this measure in national courts and after that, in front of the ECHR. This article presents the solutions of the Romanian courts, the European jurisprudence on lowering wages and its implications for public solutions Romanian legal systems.

Keywords: financial crisis; payment cutting; civil servants; European jurisprudence

1. Introduction

Although it was considered a crisis of well-developed economies, the present global financial crises hits all the countries and the newest members of the EU make no exception. Recent legislative measures relating to reduction of public spending in Romania, including the temporary reduction of wages, passed through the filter of the Constitutional Court. This situation involves, in our opinion, a series of useful explanations in scientific terms.

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The economic and financial crisis has brought real conceptual changes in legislation, out of which the temporary reduction of wages emerges. In terms of social implications this measure made, in fact, a sacrifice curve, similar to the three sacrifice curves in Romania during 1929-1932 recessions. The reduction of the current wage is characterized principally as temporary, until January 1, 2011. As the situation of public budget has not improved, the public sector employees faced a *sine die* prolongation of salary restrictions.

2. Literature Review

The wage cuts were discussed in the literature, often with explicit reference to the provisions of the ECHR, incident to the case. Stefanescu (2011) examines whether European Convention on Human Rights and ECHR decisions may apply in the situation of wage cuts for Romanian civil servants. Under Article 20 of the Constitution, "if the court finds that domestic laws violate the conventions and treaties on fundamental human rights to which Romania is party, containing provisions less favorable than the latter, they are obliged to ignore these provisions and to apply the more favorable of international regulation". The author shows that the decisions of the Romanian Constitutional Court implies that the reductions of salaries through Law no.118/2010 does not infringe Romanian Constitution, it does not prevent the courts to respect the provisions of Article 20 from the fundamental law and to give priority to the pacts and treaties on fundamental human rights which Romania is part to. As international regulations are more powerful than domestic ones (including the Romanian Constitution), the statute of the European Court of Human Rights in Strasbourg, for example, has priority over the previsions of the Constitutional Court of Romania and it is binding for the national judges and the courts (Ştefănescu, 2010, pp. 9-15).

Selegean (2011) believes that, in terms of proportionality, the lack of compensation for the reduction of civil service salaries by 25%, does not lead to violation *eo ipso*. It should be considered that the Court leaves for the Member states a high level of appreciation in establishing their own policies in this field. He considers that this level is even higher, if the need for state intervention results from the consequences that the international economic crisis has on the budget deficit. Consequently, the previous statement of constitutionality for Law no.118/2010 does not oblige the national court to verify whether the law provisions do not generate in practice effects contrary to the Convention spirit. This analysis cannot ignore the ECHR

jurisprudence in the field, which gives no specific guarantees for the right to continue to receive a salary in a certain amount. However, it is possible that such a case brought before the Court will reach the proportionality analysis, as the law implies also the reduction of pensions. There are other mandatory issues to be checked, also as the discriminatory effects of the reduction measure, the severity of the measure (total deprivation of rights or the reduction of it in a measure which might affect the substance of the right) and the particular effects of this measure in the specific case of the applicant (Selegean, 2011, pp. 1-3)

These nuances recommend a detailed analysis of wage reductions, as measure of budgetary policy, used in Romania since 2010.

3. Recent Public Institutions Actions on Salary and National Courts Opinion

The wage system was a key element in civil service reform. Article 29 from Statute of the civil servants provides that civil servants are entitled to basic pay, seniority and supplements (for the post and grade). The civil servants receive bonuses and other labor rights, according to the law. The salary system takes into consideration the classification of the posts and degrees for officials. The seniority may go up to 25% after 20 years of work. According to the current text, the public officials are entitled to a salary composed of base salary and bonus for seniority.

Also, for working-time over the normal 8 hours per day and during public holidays or holidays, the civil servants are entitled to have additional spear time or to receive a financial bonus (the increase of 100% of basic salary). To these above, the regulation added the allowance for holiday and the benefit of an initial base salary equal to the remuneration paid in the month that preceded the leaving on holiday.

Between 2003 and 2009, the number of bonuses for civil servants increased, and it exceeded 100% of salary. Some of these bonuses are considered illegal because they were granted on the basis of collective agreements, so the beneficiaries were forced to return the amount received with this title. Among the bonuses that have to be paid back by civil servants are the supplements for stress, public relations and screen, toxicity, mobility, retirement, smile, loyalty, privacy, or the value of the gift vouchers received for the holidays.

Law no. 329/2009 aims at reorganization of public authorities and institutions, public expenditure rationalization, business support and compliance framework agreements with the European Commission and International Monetary Fund (published in the Official Monitor, Part I, no.761/9 November 2009). In the name of the same economic crisis, the government appeals to the provisions of Article 53 of Constitution in order to restrict the exercise of the right to work. However, the systematic restriction of certain rights, which tends to become a rule in the conduct of Romanian public authorities, is within the constitutional framework, considering the provisions of Article 53 from the Constitution.

Under severe economic conditions imposed by the economic crisis, The Law regarding necessary measures to restore budgetary balance is, in reality, the method to regulate restrictions on the exercise of fundamental rights, as follows: a limitation on the exercise of the right to work (due to limitation of the right to be paid, by reducing the amount of wages with 25%), a limitation on the exercise of social security rights (determined by reducing the amount of pensions by 15%), a limitation to the exercise of the right to unemployment benefits (resulting from the reduction of unemployment benefit amount by 15%), and a restriction for the exercise of the right to social assistance (embodied in refusing aid or benefits at retirement and the withdrawal or reduction with 15% of the amount of allowances granted under Government Emergency Ordinance no.148/2005 on family support for child's growth).

The limitation of fundamental rights should not exceed the framework of temporary measure. This unequivocally and clearly results from the provisions of Article 17 of the Law. Thus, according to paragraph 1, the limitation of the right to work, pension, unemployment benefits and social assistance shall apply until 31 December 2010. Paragraph 2 of article cited above states that "From the 1st of January 2011, social policies will apply to employees to ensure compliance with the spending levels resulting from the reduction measures taken during 2010, according to the Law no.330/2009 and in compliance with the state budget and state social security budget for 2011".

Stating that, the provisions of Article 17 (2) not only enshrined the temporary nature of the measure, but allowed the limitation of all these rights to continue after 1 January 2011. The direct effect is the transformation of a temporary restriction into a permanent restriction that has no constitutional legitimacy.

The provisions of the criticized law are in considerations with Article 1 from the 1st Protocol to the Convention on Human Rights and Fundamental Freedoms. The rights to salary, especially the rights arising from contributions to social security schemes, such as pension rights constituting property rights, are especially protected by this text. Recognizing the appreciation margin of the member states in matters of social legislation, the European Court of Human Rights stressed the obligation of public authorities to maintain a fair balance between the imperatives of public interest and protection of fundamental rights of citizens. The balance is not maintained when the citizens have to bear an excessive and disproportionate burden, as direct effect of reducing the economic rights. In such situation, there is a violation of Article 1 of Protocol No.1 to the Convention on Human Rights and Fundamental Freedoms due to violation of reasonableness and proportionality of reducing property rights (Case *Kjartan Asmundsson v. Iceland, Case Musk v. Poland)* (Coban, 2004, p. 128). It is clear that reducing the economic rights by the law regarding the necessary measures to restore the balance of the budget imposes excessive and disproportionate burden to the budgetary employees, without maintaining a fair balance between public interest and fundamental human rights protection imperatives.

In the public sector, the Law no.118/2010 regarding the measures necessary to restore the balance of the budget, decreased by 25% the gross wage/monthly allowances of framing, including bonuses, allowances and other salary rights. All the payments, established in accordance with the Law nr.330/2009 (for personnel wages paid from public funds) and in accordance with the Government Emergency Ordinance no.1/2010 (concerning measures for the members of the public institution staff and their salaries), decreased by 25%. Simultaneously, a number of rights in the field of social security were dropped.

In Decisions no.871, no. 872, no. 873 and no. 874, all from 2010, the Romanian Constitutional Court decided that:

The measures as cutting salaries in the budgetary system, the limitation of social security rights, and special pension recalculation are constitutional. It is to be noted that there are some exceptions, admitted only for judges, prosecutors and assistant magistrates of the Constitutional Court;

The measures as reduction of the payment of pensions with 15%, the reduction of caregiver allowance for pensioners with certain degree of disability by 15%, the fixing of pension point in the amount of 622.9 RON (value taken into consideration

to determine the gross amount of pensions and attendant allowance for disability pensioners), the pension recalculation for judges, prosecutors and magistrates of the Constitutional Court assistants are not constitutional.

The temporary reduction of wages in the public sector is possible, according to the Constitutional Court, because those who are employed in public sector (employees and civil servants, mainly) are connected, essentially to the national budget, in terms of the source of salaries and allowances, namely expenses. As the national public budget imbalance may have major consequences, damaging the general interests, it is possible to impose the restriction of this budget, including reduction of salaries and allowances, which are personnel costs. The right to payment is the corollary of the constitutional right to work, the reduction would involve a real limitation on the exercise of the right to work, and therefore, such a measure can only be done under strict and limited set of art.53 from the Romanian Constitution.

The national security does not involve only strictly military security, but has a social and economic component. Thus, not only the existence of an actual military situation attracts the applicability of the notion of "national security" in spirit the art.53, but other aspects of state life - such as economic, financial, social aspect - that could affect the state itself by the size and severity of the phenomenon.

In the vision of the national Constitutional Court, considering the threats to economic stability, manifested by budgetary imbalances, the Government was entitled to take appropriate measures to combat it, including reduced spending, which embodied, among others, reducing the amount of wages for the civil servants. The measure of restraining salary, as provided by law, was necessary in the present context, in order to maintain democracy and safeguarding the state. The Constitutional Court finds that there is a relation of proportionality between the means employed (25% reduction in the amount of wages) and the legitimate aim pursued (reducing spending/rebalancing the state budget) as well as a fair balance between the requirements of general interest and protecting fundamental rights for the citizens. The measure applied is not discriminatory, meaning that the 25% applies to all categories of staff, in the same amount and the same way. The problem of damaging the constitutional right to work is solved by the temporary nature of this measure.

Considering Article 17 of the Universal Charter of Fundamental Rights of the European Union, in conjunction with Article 6 paragraph 3 of the Treaty on European Union – Consolidated version, and Article 52 paragraph 3 of the

Universal Charter of Fundamental Rights of the European Union, Romanian national courts of law were asked for appropriate check of the legal framework by the civil servants affected by the wage-cut policy.

Based on the provisions of Article 1 of Protocol No.1 of the European Convention on Human Rights and Article 17 paragraph 1 of the Charter of the Universal Fundamental Rights of the European Union, the Romanian courts previously believed that employees and the civil servants have a right of ownership over the salary, whose reduction was ordered by the state. So, these national rules stated above come into direct contradiction with the provisions of Article 1 of Protocol No.1 to the European Convention on Human Rights and of Article 17, paragraph 1 of the Universal Charter of Fundamental Rights of the European Union. As Article 20 paragraph 2 of the Constitution expressly states, it is mandatory to be respected the principle of direct application of international regulations (Schutte, 2004, p.31).

Moving the legal analisys further, we should consider that the second part of Article 1 of Protocol No.1, presents three conditions in which the deprivation of a good is not a violation of property rights of the holder of that asset, as follows (Loof, 2000, p.41):

a) deprivation is required by law, that is the national rules applicable in the field;

b) deprivation is imposed by the public interest;

c) deprivation complies with the general principles of international law.

The Convention jurisprudence added a new condition that is the need for proper compensation arrangements for the right holder. Another jurisprudential creation has become a common condition both in terms of deprivation of property, as well as in terms of limitations as stipulated by art. l parag.2 of the Protocol no.1, respectively, any limitation must be proportionate to the aim taken into account in establishing them.

The Commission decided the value of a principle for the deprivation of property to be provided by law, to pursue a cause of public utility, to comply with national rules and to respect the proportionality between the means used and the matter concerned. The deprivation of property must spare a fair balance between the needs of general interest and the individual's fundamental imperatives, especially the reasonable compensation and proportionate value of the property, given to its holder (edh Commission, 15 January 1998, nr.19734/92, Xc / Italy).

The Romanian courts briefly review the above conditions for the 25% reduction of the wages in the Romanian public sector:

- *The existence of interference*: the 25% salary reduction deprives the employees, civil servants, of the right to ever receive any money for this percentage. This is undoubtedly an interference which had the effect of depriving them of their property, in meaning of the second sentence of first paragraph of the Protocol no. l.

- *Deprivation of property is provided by law*: The condition that deprivation of property is provided by the law is fulfilled if there is a law, under the Convention, which has the effect of depriving the property and if this law meets the conditions determined by the Court in its jurisprudence, respectively: to be accessible, precise and predictable. Romanian Law No.118/2010 regarding the establishment of measures to restore budgetary balance satisfies the above conditions: it is a accessible, precise and predictable law in terms of ECHR jurisprudence.

- *Interference is imposed by the public interest*. According to the explanatory memorandum of the Law no.118/2010, its adoption was imposed in order to respect the commitments assumed by Romania through signing the loan agreements with international financial organizations, agreements absolutely necessary for Romania's economic stability. The Govern appreciated that the reducing existing imbalances and maintaining the budget deficit within sustainable limits creates prerequisites for economic recovery, the salary reduction being imperative.

In Romanian Governs opinion, a pay cut of 25% is an objective and reasonable interference in relation to the scale and impact of current and expected consequences. Without this measure the state will be deprived of funding sources, necessary for survival as a state of law and a democracy. The argument of promoting this measure is the needed to combat the economic crisis, a phenomenon which, if maintained, could endanger Romania's economic stability and, thereby, public order and national security. The country's economic stability and protection of national security are concepts that circumscribe to the concept of "legitimate aim of public interest" and the concept of "the public interest".

- *Proportionality of the interference with the legitimate aim pursued*: interference is proportional to the legitimate aim pursued if it maintained a fair balance between the public interest requirements and imperatives of defending fundamental human rights. The reduction was determined and was absolutely necessary in a democratic

society, considering the financial data submitted and the budget estimates, being proportional to the situation that led to the adoption of this legislation.

4. The Evolution of ECHR Jurisprudence Regarding Wages in Public Sector

In connection with art.l from Protocol No.1, starting with *case Sporrong Lönnroth vs Sweden* and to the latest decisions in the field, European Court of Human Rights determined that three distinct conditions, closely related between them, should be considered, namely (Birsan, 2010, p. 1641):

- First, the principle of respect for property;
- Second, the deprivation of property should meet certain requirements;
- Third, the power recognized to the Contracting States to regulate the use of property in accordance with the general interest and to secure payment of taxes or other contributions or penalties. (The case *Gasus Dosier – und Fördertechnik GmbH against the Netherlands* states that the last two rules must be interpreted in the framework laid down by the first rule principle, because they refer to special cases of violation of the right to peaceful enjoyment of possessions).

The first condition claims that employees, civil servants, are holders of the right to property, in the moment of their diminution of salary. As employee, the person acquires a right to claim from the employer the payment of wages. European Court of Human Rights decided that wage is a good, in the vision of Article 1 of the First Protocol to the Convention on Human Rights and Fundamental Freedoms, if it is due or if the employee may claim that he has a "legitimate expectation" to see it materialized (*M. Napohs-Poclieco C / Belgium*, 4 July 1978. Nr.7742/1977, *Kopecky c / Slovakia*, 8 January 2008*).*

In terms of salary, the ECHR jurisprudence expresses the ownership area, in the light of the article 1 from the Additional Protocol No.1 to the Convention. Thus, the Court has stated: "The Court accepts that a right, purely economic, as the salary is stipulated in collective agreements, prevails over government decisions. Consequently, the characteristics of private law of the case prevailed on the characteristics of public law" (*Case De Santa, Lapalorcia, Abenavoli, Nicodemo v. Italy*, 2 September 1997, nr.27/1996/646/831, paragraph 18). "A future benefit is a good" within the meaning of Article 1 of Protocol No.1, if that gain was already

purchased or it is subject of a debt" (Case *Saggio v. Italy*, 41879/98). Also, we must consider the Decision of 15 June 2010 in *Case Muresanu v. Romania* (application nr.12821/05), when the European Court of Human Rights in Strasbourg ruled expressly that salary is a "good" within the meaning of Article 1, line l from the First Protocol.

In order to have a right to salary recognized, the person concerned has to meet all the conditions stipulated by national legislation. The concept of "goods" in the first part of Article 1 of Protocol No.1 has an autonomous meaning, which is not limited to ownership of material goods and is independent of formal classification in domestic law. In the same way as material goods, certain rights and interests considered assets may be treated as "property rights", and "possessions" within the framework of this provision.

The employees, civil servants, had in possession a good when it refers to the recalculation of salary rights, so a comparative analysis of the evolution of rights protected by the Convention, in terms of the Protocol no.1 additional to the Convention, is entitled. A rich jurisprudence of the Court and the value of general principles applicable to the remuneration stated without doubt that salary is a good according to the ECHR.

Regarding the quantum of wage, the ECHR stated: "when a Contracting State has in effect a law relating to the payment of insurance benefits as protection, whether conditional or not on payment of prior contributions, such benefits must be considered property, within the scope of Article 1 for persons who meet predetermined conditions (*Stec v United Kingdom*, 65731/01 and 65900/01 No, § 54, ECHR 2006). Moreover, if the amount of benefit is reduced or stopped, it is an interference with the right of property, which needs to be justified by general interest (*Kjartan Asmundsson v. Iceland*, Decision of 12 October 2004, ECHR 2004-IX).

It is obvious that the employees, civil servants, had in internal law a sufficient basis for obtaining wages, complying with law no.330/2009, as guaranteed by the state through its legal framework and collective labor contracts at branch level for 2008-2010. So, the salary that civil servants are entitled to obtain corresponding to their work is a good, within the meaning of paragraph 1 of the first art. l Protocol to the Convention.

In December 6, 2011 (Case no.4232/11, Felicia Mihaies vs Romania and respectively case nr.44605/11 Adrian Gabriel Sentes vs Romania), the European

Court of Human Rights rejected as inadmissible the claims of two plaintiffs who complained that the 25% reduction in wages disposed by the law no.118 in 2010 is a violation of Article 1 of Protocol No.1. Referring to earlier decisions (*Vilho Eskelinen and Others vs. Finland, mutatis mutandis, Kjartan Ásmundsson vs. Iceland, Ketchko vs. Ukraine*), the Court considered that it was difficult for plaintiffs to allege a good under Article 1 of Protocol no.1 of the ECHR.

In essence, the Court considered that such interference is justified (as it was required by law, even assuming that the applicants should be holders of an asset), it pursued a legitimate aim (the State budget balance in the economic crisis) and it is proportionate, given the wide margin of appreciation of the state in economic and social policies and the balance achieved by such measures (*Hasani vs. Croatia*).

ECHR showed that the decision in case *Muresanu v. Romania* from 15 June 2010 is not a precedent for the wage-cut case, given the fundamentally different legal framework: the applicant had obtained, in court, a decision saying that the authorities were obliged to pay a certain salary. In this context, the jurisprudence against Romania (*Aurelia Popa v. Romania*, cause of 26 January 2010) covers only the hypothesis of non-execution of court decisions and is not the amount of salaries of civil servants are diminished by law.

The ECHR makes an essential distinction between the right to continue to receive a certain amount of money and the right to receive the actual wages earned for a period in which work was performed (*Lelas v. Croatia*, 20 May 2010, par.58). Therefore, we observe in the ECHR jurisprudence regarding the salaries, the following principles:

- The Convention does not confer the right to continue to receive a salary in a certain amount (Decision in case *Vilho Eskelinen vs. Finland* on 19 April 2007, par.94).

- It is up to the state to determine what amounts will be paid to its employees from the state budget. The State may enter, suspend or cancel payment of bonuses, making the necessary legislative changes. However, if a legal provision in force is determined for pay increases and conditions for this have been met, the authorities can not deliberately postpone their payment, as long as the legal provisions are in force" (Decision *Kechko vs. Ukraine* on 8 November 2005, Par.23).

So, the diminishing, by law, with 25% of the amount of salaries of civil servants is a new case for ECHR, the Romanian particular situation requiring a proper

decision. If this enters the field of proportionality of the interference analysis, we believe that the test would apply similarly to the causes related to lower pensions. All examples below are for cases relating to pension, but we think they would be relevant in case of salaries.

Although surprising, such interference is not as "deprivation of property", according to the case *Aizupurua Ortiz vs. Spain*, where the loss of a supplementary pension is analyzed in terms of general rule regarding the right to peaceful enjoyment of possessions. The Court does not analyze the situation to reduce pensions or salaries as interference with "Private Property". Consequently, no compensation for the interference does not lead, *eo ipso*, in violation of art.1 of Protocol no.1.

The state enjoys a wide level of appreciation to determine the framework and intensity of its policies in this field. The Court finds that it is not its role to decide whether there were more appropriate legislative solutions to achieve the objective of public interest pursued by the authorities, except when appreciation is obviously groundless (*Wieczorek vs. Poland*, Decision of 8 December 2009, par.59 or *Mellacher vs. Austria*, decision of 19 December 1989, Series A no.169, par.53).

Since it is not a deprivation of property, the proportionality test will not check the possibility of granting by the state an appropriate compensation, but it will review in particular, to what extent the civil servant was totally devoid of salary (*Kjartan Asmundsson vs. Iceland*, Decision of 12 October 2004, par.39), the official and his family were completely deprived of means (*Azinas vs. Cyprus*, par.44) or measure is discriminatory (Kjartan Asmundsson vs. Iceland, cited above, par.39).

ECHR decision clearly shows that there is no such a principle of "acquired rights" in the field of labor rights, which it has been so often considered, especially in Romanian courts. Regarding the situation that caused the 25% restriction, ECHR considers that there is a proportionality linkage between the mean (25% reduction in the amount of salary / allowance / balance) and the legitimate aim pursued (reducing spending/rebalancing the public budget) and that there is a fair balance between the demands of the general interest of the community and protection of fundamental rights of the individuals. Moreover, the concern to ensure such a balance is reflected in the previsions of the art.1 from the first Protocol of the convention (Case Pressos Compania Naviera - SA and Others v. Belgium, 1955).

5. Conclusions

The decision of inadmissibility, pronounced by ECHR on December 6, 2011 in the cases Adrian Mihaies and Felicia Gabriel Sentes against Romania, found that the reduction by 25% of the public servants wages did not affect the Article 1 of Protocol No.1 to the Convention. The solution of the Court, extremely important for national legal system, ends the controversy over the fundamental human rights in the context of implementation of Law no.118/2010 on measures necessary to restore budgetary balance.

To conclude, in terms of proportionality, the lack of compensation for salary reduction may not lead to violation *eo ipso*. The Court leaves the Member states high margin of appreciation in establishing their policies in this field. We consider that this margin is even stronger required for insuring state intervention, when the international economic crisis has consequences on the budget deficit.

Still, we consider, even in these conditions, that the conclusion on the violation of the convention could be different. In particular cases, when concrete circumstances show that the employee bears a disproportionate and excessive effect, the result of the legal analysis might be opposite. For example, the 25% reduction is disproportionate when there are other losses of income, so family financial situation is severely impaired, the citizens are unable to pay rates, maintenance and daily subsistence costs. Also, we connect the proportionality analysis with the temporary nature of the measure. In this respect, decision on Convention violations must be made on a case by case basis. It is hard to argue on the ground of noncompliance with Convention rules for an entire category of employees or types of bonuses. The large margin of maneuver recognized for Member State by the ECHR makes us say that only in really exceptional circumstances a violation of the Convention could be reach.

Although the measure of reducing wages by 25% in the public sector is active by law and the power of law is equal for all, we consider that the European court might draw a different solution. This will happen if the circumstances of a particular petitioner would be different from the plaintiffs in the cases against Romanian govern, solved in 6 December 2011.

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