SOME CONSIDERATIONS AND POSSIBLE SOLUTIONS FOR THE REMUNERATION OF PUBLIC SECTOR PERSONNEL - ACCORDING TO THE FRAMEWORK LAW ON THIS MATTER

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Abstract

The study aims to analyze the Law no. 153/2017 on the remuneration of staff paid out of public funds, highlighting both the positive aspects and especially the deficiencies of the regulation. We have in mind those concerning the subject of regulation, the adoption procedure, the principles governing the salaries of this category of staff, and the established solutions. Correspondingly, we propose to formulate some basic solutions to be considered in the future. This in the context in which such a regulation needs to reveal its vocation to represent a genuine "salary code", to devote solutions that can provide it with efficiency and stability.

Keywords: *salary, contract staff, civil servants, dignitaries, legality, equity, efficiency, stability.*

JEL Classification: H83, K23, K31, J45

1. General considerations regarding the right to pay and the general salary regime in the current constitutional and legal framework

The Romanian Constitution, revised[2] and republished[3], enshrines work regulation, together with social protection, as one of the fundamental rights that can not be restricted. The constituent legislator preferred this regulatory formula that includes a "can not be restricted" denial instead of an affirmation, which states that this right "is guaranteed" or "it is assured to everyone". Such a wording could have been interpreted as an obligation on the part of the state to secure a job for all, which in a market economy is impossible to achieve. Its interpretation and application can only be achieved by reference to other constitutional texts which supplement its meaning and meaning, such as art. 40 on the right of association, including trade unions, employers' associations and other forms of association, including professional, which are regulated separately in art. 9; art. 42 which regulates the prohibition of forced labor; art. 43 regulating the right to strike as well as art. 47 which is devoted to the standard of living.

If we look at each of these rights, we find that the only one regulating work and the right to work in an exhaustive manner, devoting institutions to this right (labor protection, length of work, salary, collective bargaining) or the principles governing them (freedom to choose the profession, occupation, equality between women and men in pay, mandatory collective agreements) is art. 41, which led the doctrine to qualify it to be a synthesis article.[4]

The rationale for which the Constitution constituted such a right constituted, as stated by the cited author and we are not rising to his opinion, that the Constitutive Lawyer is aware of the fact that a constitutional text is needed to protect the entire regime of the right to work, in the context in which, naturally, there was no labor law adapted to the new regime, at the center of which there was a Labor Code, and it was supposed that this would not happen soon enough. The adoption of such legislation required time, and practice validated such a supposition, the Labor Code being adopted 12 years later.[5]

Of the five paragraphs of Article 41, two expressly refer to salary, par. (5) which enshrines the principle according to which "in equal work women have equal pay with men" and the second text is found in par. (2) according to which employees are entitled to the right to a minimum wage

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[2] By Law no. 429/2003, published in the Official Gazette no. 758 of October 29, 2003.

[3] The republication was made in the Official Gazette no. 767 of 31 Oct. 2003.

[4] Andrei Popescu in Ioan Muraru, Elena Simina Tănăsescu (coord.), *Constituția României, Comentarii pe articole,* C. H. Beck, Bucharest, 2008, p. 371.

[5] The Labor Code was adopted by Law 53/2003, published in the Official Gazette no. 72 of 5 February 2003.

in the economy. Both constituted constitutional sources expressing the subject matter of the analysis. Besides them, we invoke par. (5) of art. 41, which recognizes the right to collective bargaining and the binding nature of collective agreements. Given that salary is one of the elements that can be negotiated, we can say that it is an implicit constitutional springs in the matter of salary.

It should be noted, however, that salaries can be negotiated only in the private sector, not in the public or budget. This is expressly provided in Art. 138 of the Law no. 62/2011 of the Social Dialogue[6] according to which "The collective labor contracts/agreements concluded in the budgetary sector can not be negotiated or included clauses regarding money and in kind rights, other than those stipulated by the legislation in force for the respective category of personnel". In order to reinforce the above-mentioned provision and to clarify these issues in the context of non-uniform, incoherent or absent legislation that has seriously "confused" them, the third paragraph states that "The wage entitlements in the budgetary sector are set by law within specific limits that can not be the subject of negotiations and can not be modified by collective labor agreements." This is the rule. The text also admits an exception, by the second sentence of para. (3) of art. 138, which provides that "Where wage rights are set by special laws between minimum and maximum limits, the concrete wage rights are determined by collective bargaining, but only within the legal limits". We have made these clarifications to anticipate a thesis on which we will return, namely that in the budgetary sector, the wage law philosophy does not allow solutions to be put in place where some public authorities have the full freedom to determine the amount of salaries without minimum limits and maxims between which to negotiate, with the obvious exception, of the minimum wage on the economy. From this perspective, the solution according to which in the system of local public administration, the deliberative and executive authorities can establish their own salaries, without any limitation imposed by the legislator, only in principle, as we will later see, it is outside of this philosophy and not we can agree with her.

The Constitution reserves, by art. 73 par. (3) letter (p), the regulation, by an organic law, of the general regime on labor relations, trade unions, employers and social protection. We note that the text establishes that everything that involves working relations, including the regime of associative, trade union and employers' structures, and social protection, is governed by organic law. The wage regulation is not included in the enumeration, but it is undoubtedly the fact that it is circumscribed to the problems of the legal regime of labor relations, so that its regulation is also to be achieved through an organic law. In fact, in the final part of Law no. 153/2017 regarding the salaries of the staff paid from public funds[7] it is stipulated that "it was adopted by the Parliament of Romania, in compliance with the provisions of art. 75[8] and art. 76 par. (1) [9] of the Constitution of Romania, republished. "

There are no two wage laws in the Romanian legal system, one for the private sector and the other for the public sector. The remuneration of private sector personnel is regulated principally by the Labor Code, through Law no. 62/2011, to which are added other normative acts, which set, for example, the regime of granting bonuses, min. Salary, etc. This is because the public sector is governed by the principle of negotiation, which is mandatory, according to the Constitution, as collective agreements adopt following the negotiation. Instead, the remuneration of public sector staff is governed by a law covering all categories of staff in all public authorities and institutions. We say "All categories of staff", because the law comes and explains, in art. 2 par. (3) what does it mean or who is in the category of staff in the budgetary sector. The text stipulates that it is the personnel employed on the basis of the individual labor contract, the staff who are in charge of public dignity appointed or elected, and the staff who assume the functions of public dignity, the

[6] Republished in the Official Gazette no. 365 of 30 May 2012.
[7] Published in the Official Gazette no. 492/2017.
[8] Article 75 of the Constitution regulates the procedure for the referral of the Chambers of Parliament, the categories of laws that fall within the competence of the Chamber of Deputies, as the first Chamber to be notified, the deadlines and the proper voting procedure.
[9] Article 76 (91) states that "Organic laws and decisions on the rules of the Chambers shall be adopted by a majority vote of the members of each Chamber".

magistrates, as well as the personnel benefiting from special statutes, and civil servants with special status - our underlining, T.N.G.).

I have emphasized in the content of the quote the reference to civil servants with general or special status, because, in my opinion, it is questionable to include them in the category of personnel whose salary is regulated by Law no. 153/2017. We say this because Law no. 188/1999 on the Statute of civil servants[10] stipulates in art. 31 par. (3) that "The remuneration of civil servants shall be in accordance with the provisions of the law on the establishment of the unitary pay system for civil servants". From the interpretation and, moreover, the express wording of the text, it appears that the legislator's will was in the sense of a special law that would regulate unitary wages for all categories of civil servants and not a law governing in a unitary way remuneration of all categories of staff in the public sector (budget), irrespective of their status, contract staff, civil servants or public officials.

As pointed out in the literature, "since the entry into force of the law to date, for reasons that can be explained, ... the civil servants' salary law has not yet been adopted. This despite the fact that each government has assumed such a project, which it has not accomplished."[11] Not only has it been proposed and enrolled the adoption of such a law in the governance programs, but from the public information circulated, steps have been taken in this respect, European funds have been allocated for the elaboration of projects which, have drafted, without dressing the legal "coat" of a law.

It's hard or easy - it depends how the question is and what kind of answer we are waiting for, to understand who is using such a situation. In any case, the state was the biggest loser, because in the context of a fluctuating, dispersed, contradictory legislation, salary rights were set for budget staff, including civil servants, through all kinds of acts, collective agreements for employees, or collective service agreements for civil servants, including through court decisions favoring claims from these categories or even from dignitaries, which concerned the granting of wage rights not provided by law, in essence, bonuses of all kinds[12].

This has burdened the country's budget with amounts that it could not pay, which forced the adoption of normative acts on the rescheduling of payments, such as G.E.O. no. 71/2009, with subsequent amendments and completions.[13]

Equally, the courts were "loaded" with litigation aimed either at challenging the Court of Auditors' controlling acts that considered those unlawful wage rights and settled by decision, recovering them, considering them to be prejudicial or granting salary rights, others than those prescribed by law.

On this background, normative steps for the adoption of a unitary law on the personnel in the budgetary sector have existed since 2009, they materialized through the Law no. 330/2009[14], repealed by Law no. 284/2010[15], repealed by Law no. 153/2017.

2. Overview of Law no. 153/2017

As we have already said, this law aims to regulate the salaries of staff from all authorities and public institutions. Exceptions include the staff of the National Bank of Romania, the Fiscal Supervisory Authority, the National Regulatory Authority for Energy and the National Authority for Administration and Regulation in Communications.

Although it has been adopted for less than a year, reporting on the date of the study[16], it has already been amended by GEO no. 90/2017, GEO no. 91/2017, Law no. 79/2018, Law no. 80/2018.

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[10] Republished in the Official Gazette no. 365 of May 29, 2007.

[11] Verginia Vedinaș, *Statutul funcționarilor publici (Legea nr. 188/1999) Comentarii, legislație, doctrină și jurisprudență,* Universul Juridic, Bucharest, 2016, 2nd edition, revised and added, p. 116.

[12] Extensively on this situation see Verginia Vedinaș, *op. cit.,* 2016, pp. 116-122.

[13] Published in the Official Gazette no. 416 of June 18, 2009.

[14] Published in the Official Gazette no. 762 of November 9, 2009.

[15] Published in the Official Gazette no. 877/28 December 2010.

[16] It's about month April 2018.

After such a "kneeling" in law-making, published and unsettled laws in force, regulation is finally enacted, but it is far from being able to regulate, for a while, wages in the public sector, by nature to bring that framework of legality, of "social peace", necessary for the harmonious functioning of the sector it is aimed at. In our opinion, such a normative act must represent a genuine "payroll code" in the budgetary system. He must devote solutions that respect, first of all, the principles that the law itself enshrines in art. 2, and we stop at the social importance of work, in terms of responsibility, complexity, activity risks and level of studies; equality or stimulation of the budgetary sector personnel, in the context of recognizing and rewarding the professional performances obtained on the basis of the criteria established according to the law and its own regulations.

The first principle is that of legality and we are specifically opposed to it, for an aspect that we have already anticipated in the previous section and which refers to the legislative solution on wages in the sphere of local government.

Thus, according to art. 2 letter a) of Law no. 153/2017, the significance of the principle of legality consists in the fact that "the wage rights are established by legal norms with the force of the law, except for the judgments provided in art. 11 par. (1) according to the principles stated in art. 120 of the Constitution of Romania, republished, but within the minimum and maximum limits provided by the present law ". Article 11 paragraph (1), as amended by Law no. 80/2018 stipulates that "For civil servants and contract staff within the" Administration "family of occupational families in their own county council, town halls and local councils, in public institutions and services of local and county interest subordinated to them, the basic salaries shall be by decision of the local council, the county council or the general council of Bucharest, as the case may be, following the consultation of the trade unions representative or, as the case may be, of the representatives of the employees (our underlining -TNG).

In the following paragraphs, certain limits are set in principle, namely the prohibition that the level of salary incomes exceeds the level of the monthly allowance of the deputy mayors, respectively of the vice-presidents of the county council, which is not established either. As we have already said, in our opinion the solution is elusive and leaves room for discretionary power too much for local autonomous authorities. It is argued, in support of her, Art. 120 of the Constitution, which enshrines the principles of local autonomy, decentralization and deconcentration of public services, which govern the public administration in the administrative-territorial units. It is, in our opinion, a pseudo-argument, because autonomy, itself, is exercised under the conditions and limits of the law, as it is at present in Law no. 215/2001 of the local public administration[17].

We have previously claimed that Law no. 62/2011 enshrines the principle of legality in wages, with the exclusion of the possibility that wage settlements should be negotiated. The doctrine pointed out that "In a specific way, the salary rights of employees in the budgetary sector, as they are established exclusively by law, can not be the subject of negotiations, nor can they be modified by collective agreements, with one exception: which a very special law would set minimum and maximum pay limits, a hypothesis where wage rights can be negotiated within these limits."[18]

In conclusion, we believe that the established legislative solution is inconsistent with these principles and that, by *de lege ferenda*, it should be rethought. It is true that local autonomy needs to be strengthened, but it can not be done against constitutionality and legality. We believe that, in the salary plan, it must assume the right to negotiate within the limits set by the law, not in vaguely consecrated landmarks of principle. Among the principles governing wages in the public sector is equality and non-discrimination[19]. It is obvious that they will be violated in the context in which the personnel in the administration of an urban or rural community has a salary and that in another

[17] Republished in the Official Gazette no. 123 of 20 February 2007.

[18] Ion Traian Ștefănescu (coord), Ezer Marius, Gheorghe Monica, Sorică Irina, Teleoacă-Vartolomei Brândușa, Uluitu Aurelian Gabriel, Voinescu Veronica, *Codul muncii și Legea dialogului social, Comentarii și explicații,* Universul Juridic, Bucharest, 2017, p. 411.

[19] According to art. 2 lit. c) and d) of the law.

locality, of the same category, exercising the same type of attributions, has a double or even higher salary. The dangerous consequences have not been delayed, there are, at present, many localities that have no more money to invest, because all the allocated funds have been spent on salaries. It is obvious that such a consequence arose due to the way in which the legislative solution regarding the remuneration of this type of staff was actually interpreted and applied.

Referring to the law as a whole, the very fact that from the date of its entry into force there was no period without a certain professional category not to feel the negative effects of the application of Law no. 153/2017 is the most convincing argument that its provisions did not reveal its ability to represent a regulation that would solve wage problems in the budgetary sector, not to generate others.

3. What to do. Conclusions and possible solutions

As stated in the first part of this study, in our opinion a law on the unitary remuneration of staff paid from public funds should be a true payroll code for this category of staff. Over 28 years, we have proved our inability to regulate this area in a responsible manner. We say "responsible" because it is a sector where the funds are allocated from the state budget. We have, in other words, to do with public money. Its spending is an act in which the highest degree of authority must be expressed both by each public authority or institution and by the State as a whole. We consider several considerations:

a) the fact that the state budget funds, the budgetary resources are not unlimited;

b) the budgetary policy promoted in the public sector should take into account the balance between the funds allocated to the remuneration and those allocated to investments, the development of the administrative-territorial units and the state as a whole. The fact that there are localities which, on the basis of the concept of the law, which we consider to be faulty, no longer have the necessary funds for investments because they were spent on wages, is the most convincing argument that the legislative solution needs to be changed;

c) budget policy must be conceived in a manner that will help solve the problems faced by each state. As far as Romania is concerned, it is about the exodus of specialists who decide to live and work in other countries, due to the way they value their work in the country of origin. One of the most occupational categories of this phenomenon is health. In this respect, we appreciate the concern, both legislative and institutional, to solve this problem and to cause doctors and nurses to remain in the work they have been prepared for. Who has thus invested in their professional development and who, of course, has to benefit from the financial effort he has incurred;

d) legislative instability in this matter, including after the adoption of Law no. 153/2017 demonstrates that the promoted solutions are not entirely fit to meet the rule of law and overall regulatory objectives.

The question is, what should be done and what vision should be promoted in the future? In our opinion, the solution is not that of the permanent "wolves" of the law, whenever a problem arises. The solution we believe should be that of a rigorous analysis of it, involving people with exoplanets, including from academia. To refer to the "rails" of the law and to propose solutions that, once adopted by Parliament, show their "long-term" efficiency. Otherwise, we will continue to "drift" in terms of legal normality with regard to the weakening in the budgetary sector, with so many negative consequences for both staff and the state as a whole.

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