

Some Legislative Vulnerabilities in the Matter of Equal Treatment and the Principle of Non-Discrimination in the Legal Service Relations of Police Officers

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In the analysis of our study we had as a starting point the principle of non-discrimination and equal treatment that governs legal employment relationships, so that later we migrated to the service relationships of police officers, on which occasion we identified their specific features and some vulnerabilities of the legislation in force, which have generated and continue to generate practical problems during the implementation of those legal provisions. The importance of the theme is reflected in the fact that the functioning of the Police organization is directly proportional and depends on the degree of legal protection offered to its members (police officers), and the organizational balance is built on individual balance, or such a desire can be achieved, including ensuring and, above all, respecting the principle in question.

Keywords: equality, non discrimination, service relationships, Police, statute, special law, judicial practice.

I. Introduction

The principle of equal treatment and non-discrimination is one of the guiding ideas applicable in the field of labour law, having its origin in the provisions of art. 16 of the Romanian Constitution (*"The citizens' equality of rights"*), reiterated by the Labour Code in art. 5, this time with direct action in the field of both individual and collective employment. Thus, *"in labour relations, the principle of equal treatment of all employees and employers works"*, any direct and indirect discrimination being prohibited, as defined by the art. 5 of the Labour Code. On the one hand, we are dealing with a duty of the legislator to regulate the legal relations *"under the conditions of legal equality of the parties"*³, being an equality before the law, which, when not observed, raises the issue of unconstitutionality of the adopted normative act. On the other hand, we identify a legal obligation incumbent on the employer to not discriminate the employees, an obligation supplemented by the provisions of the Government Ordinance no 137/2000 which provides in art. 1 par. 2 that *"The principle of equality between citizens, the exclusion of privileges and discrimination are especially guaranteed in the exercise of the following rights: (...) (i) the right to work, to free choice of employment, to fair and satisfactory work conditions, the right against unemployment and to an equal wage for equal work, the right to a fair and satisfactory*

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³ Alexandru Țiclea, *Labour law treatise. Legislation. Doctrine. Caselaw*, 10th updated Edition, (Bucharest: Universul Juridic Publishing House, 2016), 60.

remuneration; (...) ”, the contrary behaviours meeting the constitutive elements of some contraventions and being sanctioned accordingly⁴.

Sui generis, in a contractual legal relationship, discrimination entails the occurrence of an unfavourable situation for one of the parties in a discretionary manner without objective justification. We must necessarily recognize the existence of situations of inequality imposed or permitted base on objective criteria, but supplemented by compensatory legislative interventions in favour of the person in a position of inferiority⁵.

In concreto, in labour relations, the employer's obligation to ensure equal treatment for all employees is deeply violated by favouring some of them, thus disadvantaging others, without the existence of circumstances that would allow such an approach. The concept of employee means both the natural person who is part of an individual labour contract as a wage earner and who is subjected to the provisions of the Labour law, and the natural person as part of a labour relation, governed by special normative acts. The legal labour relations of police officers are not based on the conclusion of an individual employment contract, but on an unwritten agreement of wills, formed by the will of the police officer manifested prior to the occurrence of the labour relations (through a multitude of behaviours starting with the enrolment in one of the educational institutions of the Ministry of Internal Affairs or filling in a vacancy to taking the oath of allegiance) and the will of the Ministry of Internal Affairs as an employer (expressed in the administrative act of appointment to the first position). The labour relations of police officers are born, executed, modified, suspended and terminated under the conditions of Law no 360/2002 and other special normative acts, the provisions of the Labour Code representing the common law in labour relations, which is equivalent to the fact that its provisions will be applicable to labour relations, whenever some matters are not addressed by the special laws in force. Such a case in which we have to resort to the provisions of common law is represented by the principle of equality and non-discrimination of police officers.

Our study aims to highlight and analyse some of the legislative vulnerabilities that could generate practical inequities in terms of police officers exercising some of their rights.

II. Results and discussions

Results are presented in three different sections: 1 Appreciations regarding the support given to police officers in the purchase of a house; 2. Considerations about the legislative evolution regarding the granting of days off for parents in order to supervise children, in case of limitation or suspension of teaching activities that require the actual presence of children in schools and early childhood education units, following the spread of SARS-COV2 coronavirus; and 3. Some aspects regarding the salary of the teaching staff within the Ministry of Internal Affairs

A Appreciations regarding the support given to police officers in the purchase of a house

According to art. 31 par. 1 of Law 360/2002, “the police officer who meets the conditions for being granted the monthly rent compensation and who receives a real estate or a mortgage loan for the purchase of a house benefits from the monthly rent compensation for a period, which may not exceed the duration of the credit in question, for the payment of the instalment or a fraction of the loan instalment”. Therefore, it is about the right of the police officer, appointed in the first position

⁴ Ibid.; Ion Traian Ștefănescu, *Theoretical and practical labour law treatise.*, Revised 4th Edition, (Bucharest: Universul Juridic Publishing House, 2017), 90;

⁵ Ion Traian Ștefănescu, *Theoretical and practical labour law treatise*, 90.

or moved in the interest of work and who does not own a personal property in the locality where he works, to receive monthly compensation for rent, even after purchasing a personal property in the locality where the police unit is based, based on a sale-purchase contract with the payment of the price in instalments by contracting a mortgage or real estate loan. The legislator makes express reference to a certain category of police officers, namely those who meet the conditions for being granted the monthly compensation for rent, who will continue to collect the compensation in question. Per a contrario, the police officers who purchased a home through sale-purchase contracts with the payment of the price in instalments, prior to 2018, when this right was recognized by Law no 288/2018 for amending and supplementing some normative acts, do not receive financial support for the payment of the instalment or a fraction of the instalment. Practically, at the moment, there are police officers who are granted financial support for the payment of instalments related to loans contracted for the purpose of buying personal property and police officers who, although they pay instalments contracted with the same motivation, do not benefit from any compensation from the employer on the grounds that they bought the houses before 2018. We appreciate that this is an inequity generated by the deficient expression chosen by the legislator that focused on rent compensation and not on what was intended to be the right to benefit from financial support for the purchase of housing with the payment of the bank loans in instalments, meaning a compensation granted to police officers "in consideration of their special obligations, in order to stimulate their loyalty to the institutions they work for, the values and principles of the Romanian state and European Union, in the spirit of the most competent and adequate service possible for the benefit of the citizens". We ask ourselves whether the legal provision is constitutional in the context in which there are police officers to whom the provisions of art. 31 par. 1 of Law no 360/2002 do not apply, but they are in situations that are similar to those to whom the provisions already apply, and who purchased houses through bank loans and pay the monthly instalments. That is why we propose the modification of the phrase "benefit from the monthly rent compensation" with "benefit from a compensation equal to the monthly rent compensation" by *lex ferenda*, as well as the completion of the legal text in the sense of its applicability *ex nunc* to police officers who currently pay instalments following the contracting of mortgage or real estate loans intended for the purchase of a house in the locality they work in.

B Considerations about the legislative evolution regarding the granting of days off for parents in order to supervise children, in case of limitation or suspension of teaching activities that require the actual presence of children in schools and early childhood education units, following the spread of SARS-COV2 coronavirus

In its current form, the Government Emergency Ordinance no 147/2020, establishes, as a rule, the obligation of employers to grant days off to employees for the supervision of their minor children under 12 in case of limitation or suspension of teaching activities that require their actual presence in schools or early preschool education units where they are enrolled for reasons related to the evolution of the pandemic that has affected the entire world.

By derogation from this rule, pursuant to Art. 4 par. 1, the employees of the national defence, public order and national security system, the penitentiary employees and the personnel of the public sanitary institutions benefit from days off upon request and only with the employer's approval, as there is no longer an obligation of the employer in this case, but a right of the employee that will be analysed from the perspective of the public interest served by that the unit where he is employed. Thus, if the days off cannot be granted, under the conditions of art. 4 par. 3, the employee will have the right to a salary increase granted in addition to the due salary rights, as compensation, in the

amount of 75% of the basic salary/official salary/official pay corresponding to a working day, but not more than the daily correspondent of 75% of the average gross salary used to substantiate the state social insurance budget.

In its original form, par. 1 of Art. 4 expressly provided that the employees in question, including police officers, did not benefit from days off for the supervision of their children, and par. 3 stipulated that "*If both work in one of the fields stipulated in par. (1), only one of them is entitled to a salary increase in addition to the due salary entitlements, in the amount of 75% of the basic salary/official salary/official pay corresponding to a working day, but not more than the daily correspondent of 75% of the average gross salary used to substantiate the state social insurance budget, corresponding to the number of working days in the period stipulated in art. 1 par. (1)*". Surprisingly, in the case of police officers, the legal text was interpreted and applied in the sense that the salary increase would have been granted to one of the parents, only if both of them were employees of the Ministry of Internal Affairs or other fields taken into consideration, thus refusing to recognize the compensation provided by the law to police officers whose spouses were not employed in the national system of defence, public order and national security, of penitentiaries or in a public health unit, despite the fulfilment of all the conditions provided. Noticing these difficulties of interpretation and implementation of the legal text, the legislator intervened by Law no 278/2020 for the approval of the Government Emergency Ordinance no 147/2020, amending the text of the law in the sense of express recognition of the right to the additional increase of salary rights in the context of the prohibition of granting days off, both if only one of the parents works in one of the areas mentioned, and if both parents are in such a situation. However, for the period between the adoption of the normative act and its amendment, the approach set out without any legal basis was maintained, the recognition of the compensatory right being made starting with the date of the legislative amendment described above, for police officers whose spouses were not employed in the national system of defence, public order and national security, of penitentiaries or in a public health unit and, implicitly, refusing to pay the salary increase for the previous period. We are of the opinion that such an interpretation was contrary to both the rules of interpretation of normative acts and the "spirit of the law" and we appreciate that, in the situation where only one of the parents works in one of the fields provided in art. 4 par. 1 of the Government Emergency Ordinance no 147/2020, this was entitled to the additional increase of salary rights in the amount established by the normative act in question, including in the period preceding the entry into force of the legislative amendment for the following reasons:

- the purpose of the legislator in adopting the Government Emergency Ordinance no 147/2020 was to regulate measures for the protection and support of children and parents in case when the teaching activity in schools is limited or suspended. In addition, "the granting of paid leave applies to all employees in the public and private sector", as expressly stated in the explanatory memorandum on Law no 278/2020. The interpretation of a text of law with disregard for the above aspects in the sense of its non-application is contrary to the adage *actus interpretandus est potius ut valeat, quam ut pereat*, which expresses one of the rules of logical interpretation of normative acts.

- the establishment of the interdiction aimed at the employees of the national system of defence, public order and national security, the employees of the penitentiaries and the personnel of the public health units, in the sense that they did not benefit from free days for the supervision of their children under the provisions of Government Emergency Ordinance no 147/2020, is justified by the importance of the field the parents work in. However, it was compensated by the legislator by granting a salary increase so that this personnel category, working in key areas, should not be discriminated against in comparison with other employees of the labour market. Yet, as regards the

staff in the situation under consideration, the interpretation was unfair, in the sense that by not granting the salary increase, the negative impact of the measures imposed, in view of the exceptional situation in which the employees were, was much stronger than in the case of other employees, because they could not benefit from days off according to the law, and that prohibition was not compensated in any way.

- in addition, the legislator did not expressly provide at any time the conditions for both parents to work in the national system of defence, public order and national security, penitentiary or public health, but merely stated that only one of the parents has the right to a salary increase granted in addition to the due salary rights, if both work in one of the listed areas. The legislator did not distinguish between parents who have the quality of employees in the national system of defence, public order and national security, penitentiary or public health in terms of granting a salary increase only for some of them, and *ubi lex non distinguit, nec nos distinguere debemus*. Moreover, over the time the restriction of the right to take days off for the supervision of children in the event of suspension of the activity of the educational establishments in which they are enrolled has been permanently accompanied by the granting of a salary increase as compensation without distinction or discrimination (see provisions of art. 32 of the Decree – Law no 195/2020, art.47 of Decree – Law no 240/2020, art.7 of Government Emergency Ordinance no 70/2020).

- in addition, by Law no 278/2020, amendments were made to the Government Emergency Ordinance no 147/2020 in order to eliminate any differences in the interpretation of the initial texts such as those set out above. The hypothesis in which the staff that is the subject of this study met the conditions of a *pendente* legal situation so that in this regard the new law will be applied - Government Emergency Ordinance no 147/2020 in its current form with amendments and completions, including the law for its approval - without being able to be considered retroactive.

C Some aspects regarding the salary of the teaching staff within the Ministry of Internal Affairs

As a general rule, the remuneration of police officers is made under the Law no 153/2017, a normative act that includes a number of nine annexes dedicated to various professional categories in the budget sector, Annex no VI referring to the occupational family of budgetary functions "*Defence, public order and national security*". We will further refer to the staff of the Ministry of Internal Affairs who has the quality of police officer employed as a teacher, which is part of the teaching staff in its own educational institutions, according to the provisions of the National Education Law no 1/2011 (published in the Romanian Official Gazette, Part I, no 18 of 10.01.2018, with subsequent amendments and supplements), our intention being to demonstrate whether this professional category can benefit from a salary increase for neuro-psychical overload.

In our approach we take into account the provisions of art.16 of Annex no I - *Occupational family of budgetary functions "Education"* of the Law no 153/2017, according to which "*the teaching staff in the educational institutions (...) is granted an increase of neuro-psychical overload of 10% of the basic salary*" corroborated with art. 13. Par. 1 of Annex no VI of the Law no 153/2017, which stipulates that "*the legal provisions establishing bonuses, compensations and other salary rights for the staff in other fields of activity of the budgetary sector apply also to the military personnel, police officers, civil servants with special status of the penitentiary administration system and civilian personnel, who are in similar situations, regardless of the type of unit in which they work, with the approval of the Ministry of Labour and Social Justice*".

In this context, from the systematic interpretation of the legal texts invoked above, we believe that it is clear that the increase for neuro-psychical overload must be granted to all police officers who, according to Law no 1/2011 of National Education, are part of the teaching staff regardless of the

legal provisions under which the gross monthly salary is calculated, depending on whether they belong to an occupational family or another. The opinion is based on the following considerations: analysing the nature of the work, the training conditions and the working conditions, all teachers must be considered as being in a comparable situation, performing the same work or work of equal value; consequently, the right to equal pay for equal work is born, whose legislative and domestic consecration "excludes any discrimination in the establishment or modification of wages from one category of employees to another"⁶(Ștefănescu, I.T., 2017: 666); a salary increase represents the variable component of the salary, which has the character of compensation for the fact that the work is carried out under certain specific conditions. In this case, the increase in neuro-psychical overload gives greater effectiveness to the work performed by any teacher, whether police officer or not.

In support of our statements, we recall the opinion of the High Court of Cassation and Justice expressed in Decision no 46/2008 (published in the Romanian Official Gazette, Part I, no 495 of 16.07.2009): "regardless of the education level, the importance, complexity and work duties, the position, the profession, the quantity, quality and value of the work, branch, field or level of activity and the amount of the basic salary (wages) of an employee, *he/she must be given a certain salary increase if he/she actually works under the conditions provided by law for being granted that increase.*

There is no legitimate, objective and reasonable justification that, in the case of 2 employees, (..) who both work - by way of example - in the same special working conditions, such as heavy, dangerous or harmful conditions, only one of them should receive the bonus and the latter should not receive it on the grounds that the law or ordinance on the basis of which the latter employee is remunerated does not provide the granting of this salary increase.

In other conditions, taking into account the conditions mentioned above, of which the role, responsibility and complexity of the duties of the various positions, functions and activities are distinguished with priority, the legislator may establish different salary rights for certain categories of staff, without bringing any violation of equality of rights provided by art. 16 of the Constitution, but this differentiated treatment must refer only to the establishment of the basic salary (wages), of the compensations that constitute the amounts paid to certain employees according to specific work criteria or expenses necessary to fulfil work obligations, as well as compensations to the basic salary that are granted according to the individual performances".

III. Conclusion

The police officers carry out their professional activity in special conditions, performing a job in a public service of general interest, reason for which it is essential that both the legislator and the employer in the process of implementing some normative acts with incidence in the matter of labour relations should ensure a fair balance between the rights and obligations that form the content of these relations, as a guarantee of the principle of combining particular interests with general ones (national order and security, respect for the citizens' rights and freedoms). In a modernist approach, the Police is an organizational structure built on its members, and their stability and individual performance are based on internal and external motivational tools alike. Ensuring the principle of equality and non-discrimination is such a lever at the end of which is the recognition of the importance of the work performed by police officers, as well as the conditions under which this work is performed.

⁶ Ion Traian Ștefănescu, *Theoretical and practical labour law treatise*, 666.

IV. References

- Țiclea, Alexandru (2016), *Labour law treatise. Legislation. Doctrine. Caselaw*. 10th updated Edition, Bucharest: Universul Juridic Publishing House;
- Ștefănescu, Ion Traian (2017), *Theoretical and practical labour law treatise.*, Revised 4th Edition, Bucharest: Universul Juridic Publishing House;
- Romanian Constitution, art. 16, republished in the Romanian Official Gazette, Part I no 767/2003;
- Labour Code - Law no 53/2003, art. 5, republished in the Romanian Official Gazette, Part I no 345/2011 with subsequent amendments and supplements;
- Government Ordinance no 137/2000 for the prevention and sanctioning of all forms of discrimination, art.1 par.2, republished in the Romanian Official Gazette, Part I no 166/2014 with subsequent amendments and supplements;
- Law no 360/2002 on the Statute of the police officer, art.31 par.1 republished in the Romanian Official Gazette, Part I no 440/2002, with subsequent amendments and supplements;
- Government Emergency Ordinance no 147/2020 on granting days off for parents in order to supervise children, in case of limitation or suspension of teaching activities that require the actual presence of children in schools and early childhood education units, as a result of the spread of the SARS-COV2 coronavirus, art. 1, art.4 par.1 and 3, published in the Romanian Official Gazette, Part I no 790/2020;
- Decree no 195/2020 on establishment of the state of emergency on the territory of Romania, art. 32, published in the Romanian Official Gazette, Part I no 212/2020;
- Decree – Law no 240/2020 regarding on the extension of the state of emergency on the territory of Romania, art.47, published in the Romanian Official Gazette, Part I no 311/2020;
- Government Emergency Ordinance no 70/2020 regarding the regulation of some measures, starting with May 15, 2020, in the context of the epidemiological situation determined by the spread of the SARS-CoV-2 coronavirus, for the extension of some terms, for the amendment and completion of Law no. 227/2015 on the Fiscal Code, of the National Education Law no. 1/2011, as well as other normative acts, art.7, published in the Romanian Official Gazette, Part I no 394/2020;
- Law no 278/2020 for the approval of the Government Emergency Ordinance no 147/2020, published in the Romanian Official Gazette, Part I, no 1166/2020;
- Law no 153/2017 on the remuneration of staff paid from public funds, art.16 of Annex no I - *Occupational family of budgetary functions "Education"*, art. 13 Par. 1 of Annex no VI *Occupational family of budgetary functions "Defence, public order and national security"*, published in the Romanian Official Gazette, Part I, no 492/2017, with subsequent amendments and supplements;
- The explanatory memorandum for the adoption of the Law no.288/2018 for amending and supplementing some normative acts, which stipulates the right of the police officer to benefit from financial support for the purchase of housing. Accessed on July 28, 2021. Online <http://www.cdep.ro/proiecte/2017/400/40/8/em567.pdf>
- The explanatory memorandum on Law no 278/2020 for the approval of Government Emergency Ordinance no 147/2020. Accessed on July 28, 2021. Online <http://www.cameradeputatilor.ro/proiecte/2020/500/80/4/em770.pdf>