Bulletin of the *Transilvania* University of Braşov
Series VII: Social Sciences • Law • Vol. 6 (55) No. 1 - 2013

THE THEORY OF THE GAINED RIGHT. ASPECTS CONCERNING ARTICLE 38 OF THE LABOUR CODE

Roxana A. ADAM[1]

Abstract: *EU legislation concerning judicial relationships pertaining to labour law has known an important change in the time between the Rome Treaty establishing the European Economic Community in 1957 and the Amsterdam Treaty in 1997. A relatively new concept in this matter is flexicurity, which is a harmonization of labour flexibility and security. Within this concept the notion of labour security differs from the classical one known in social security legislation. Flexicurity was defined by the European Commission in 2007 as being „an integrated strategy" to simultaneously enhance flexibility and security in the labour market. Within this context, after nearly a century of labour legislation, emerged on the premises created by the International Labour Organisation in view of ensuring employee protection, EU legislation has devised norms addressing worker – owner relationships, in other words the relationships between labour and capital.*

Key words: *right, employee protection, strategy, flexicurity.*

1. Introduction

Evidently the debates related to the modernization of labour legislation in the EU member states, within the three-way social dialogue, have often generated serious controversy and tension, of a magnitude that eventually has yielded the concept of flexicurity, with the aim of stopping the effects of globalisation, which on occasion is viewed as an excuse for diminishing worker rights.

It is within the framework of this flexicurity concept that the theory of gained rights emerged in the relationships between ownership and workers.

In essence the theory of gained rights means establishing workers' rights, and which, once confirmed, remain unmodified provided the circumstances of their establishing stay the same.

The theory of gained rights stays, however, „in the shadows", considering that part of the doctrine does not recognise it, and another part does not even mention its existence.

The existence of the theory of gained rights cannot be, however, denied, considering the evolution of labour legislation, reflected mostly in the European Union, and to a smaller extent in the United Nations Organisation and the International Labour Organisation, respectively, given the different economic development of states worldwide.

The Labour Code, materialised in Law 53/2003, provisions at article 38 that

[1] Faculty of Law, *Transilvania* University of Braşov.

employees cannot waive their rights recognised by law, and that any transaction aimed at renouncing or limiting employee rights recognised by law is void.

The doctrine has asserted that this provision limits the freedom of contracting, thus the free will of the contracting parties being restricted.

The conclusion is, that the Romanian legislator has included in a judicial norm a form of the theory of gained rights, as this is recognised particularly in jurisprudence.

2. Jurisprudence

In relation to article 38 of the Labour Code, the Constitutional Court has decided that the "interdiction of waiving all or part of rights granted by law to employees, is a measure of protection of the latter, meant to ensure unrestricted exercising of their due legal rights and interests within labour relationships, in view of protecting them from the consequences of possible abuse or threats by the employers.

Such a measure cannot be considered a privilege, with regard to the provisions of article 16 par. 1 of the Constitution, as long as it is justified by taking into consideration the situation of a certain social category that requires social protection".

In literature it has been argued, that the legislator could have nevertheless provided for the possibility of waiving certain rights, either in their totality – concerning rights established via negotiations in addition to those provided by law, or in part as far as their inferior limit – concerning e.g. minimum guaranteed wages, minimum guaranteed duration of vacation, etc.

The same author further argues that there is no difference in judicial treatment concerning the application of article 38 of the Labour Code, between the rights granted to employees by law and rights established conventionally, by individual or collective employment contract.

A further desideratum in the context asserts the necessity of "radically adapting article 38 of the Labour Code, such as to render it compatible with the realities of a functional market economy …".

Concerning the concept of waiving included in article 38 of the Labour Code it has been argued that this has to be limited to stipulating the inadmissibility of employees waiving their rights by understanding, concerning only certain essential rights, like work and rest time, work safety, etc.

As to the application of article 38 of the Labour Code it was retained that accepting a payment of the residual salary an employee is entitled to, does not represent waiving of the totality of such entitlements.

Regarding the non-competition clause included in individual employment contracts, this does not represent waiving in the sense of article 38 of the Labour Code, as it is not part of the imperative rights provided by law in favour of the employee.

International labour Organisation Convention 95/1949 concerning employee protection prohibits, according to article 6, the employer from restricting in any manner the workers right of disposing of their own salaries according to their own free will.

Jurisprudence retains, that payment of overtime, of benefits expressly provided by law, of night-time work or work during holidays are imperative rights provided by law and cannot be waived in the sense of article 38 of the Labour Code, even if these were not expressly formulated in the employment contract.

It was further considered that the minimum wages established by a collective employment contract at national level needs to represent the minimum

wages for any individual employment contract, in the absence of more favourable provisions at branch or unit level.

Regarding the direct link between the theory of gained rights and the provisions of article 38 of the Labour Code literature asserts that the letter of the law needs to be interpreted in the sense of "confirming the idea that an employee once having gained a right cannot subsequently lose it".

It has been appreciated, that "this solution would be functional, regardless if that right has been gained by law or convention".

In relation to this appreciation, which in our opinion confers the employee a position of stability within the judicial relationship with the employer, a question was raised, namely that of knowing whether article 38 of the Labour Code contradicts social and economic reality by limiting the freedom to negotiate of the parties.

The arguments brought in favour of employee protection "even against their own will" and that underpinned the analysis of article 38's constitutionality, refer to preventing possible abuse and/or pressure by the employer, considering the employers' special prerogatives providing them with authority and the position of organizing, controlling, assigning responsibility and applying penalties, as well as issuing mandatory rules.

The theory of gained rights has been often invoked in judiciary practice, in order to cancel the effects of norms restricting entitlements related to salaries or other social securities.

Thus, in the matter of Government Emergency Ordinance (OUG) no. 59/2011 establishing measures related to pensions, persons impacted by this norm contested the decisions of pension recalculation invoking the theory of gained rights, applied in decisions of the European Court of Human Rights.

It was argued that the recalculation of the pension infringed the contester's ownership right, as stipulated by the jurisprudence of the European Court of Human Rights.

The case of *Stec and Others v. the United Kingdom* was invoked (06.07.2005) RTDH 2006, wherein it was decided that social benefits fall under the incidence of article 1 of Protocol I to the European Convention of Human Rights, being assimilated to possessions – object of property right.

The European Court of Human Rights decided that social benefits are subject to protection, regardless of their contributive or non-contributive nature.

This theory of gained rights is also recognised by the European Court of Justice which states that more favourable benefits derived from former regulations shall not be diminished according to those granted by later regulations.

In the case of *Buchen v. the Czech Republic* (2006) the European Court of Human Rights has decided that "unjustified restriction of a recognised right, like a special pension, a right subsequently not considered, without objective and reasonable motivation for such restriction, represents deprivation of property in the sense of article 1, par. 1 of Protocol I of the European Convention of Human Rights, and also discrimination in the sense of article 1 of the Constitution and article 1 of Protocol 12".

In the case of *Gaygusuz v. Austria* (1996), the European Court of Human Rights has decided, that "the pension is a property right in the sense of article 1 of the protocol to the Convention and recognises discrimination, in the sense of article 14, in the absence of objective and reasonable justification for diminishing the plaintiff's property".

In the case of *Stubbings v. Great Britain* it was decided that "discrimination in the sense of article 14 of the Convention exists when persons in identical or comparable situations benefit from preferential treatment one in relation to the other".

In the case of *Akdeejeva v. Latvia* (2007), the European Court of Human Rights obligated the state, as responsible party,, to payment of damages, establishing the infringement of article 6 of the Convention and of article 1 of Protocol 1, in case of diminishing pensions by recalculation, considering that a pension is a gained right".

In the case of Müller v. Austria it was decided that "a substantial reduction of a pension can be considered to be affecting the substance of property right and even of the right to remain a beneficiary of the insurance system at old age".

It can be noticed, that the endorsement of the Legislative Council regarding the project of Law 119/2010 establishing measures related to pensions has a particular approach to the concepts of "possession" and "legitimate hope", viewed according to the jurisprudence of the European Court of Human Rights and the European Court of Justice.

Thus, according to article 14 of the Convention and article 1 of Protocol 1 regarding the protection of property, the European Court of Human Rights has retained that "the concept of possession includes any interest of a person of private law that has economic value, so that the entitlement to a pension and evidently to a salary are assimilated to property right.

From this perspective it appears evident that the military service pension, as currently regulated and considering the quantum provided by law represents a property right in the sense of the Convention amended by protocols, and that a recalculation of this right would by the equivalent of expropriation".

In relation to the meaning of "legitimate hope" numerous relevant rulings have asserted that this notion is to be understood as being underlain by citizens' right to legislative coherence and safety, so that based on the law they are able to exercise, maintain and defend their rights, thus materialising the constitutional principle of supremacy of law.

Concerning the unconstitutionality of certain provisions of Law 119/200 the Constitutional Court has established that "in cases of a higher pension quantum resulting by recalculation this is to be paid out accordingly, while if a smaller quantum resulted, the previously established and currently paid pension would be continued, without affecting previously gained legal rights".

As to the quantum of the salary, which can also be considered the object of the employee's property right, the approach was a different one than in the case of the pension due to a former employee.

We consider that the value of the pension determined by the retirement decision and/or by subsequent norms represents a gained right, and, as has been also asserted in the practice of the Constitutional Court and the European Court of Human Rights, cannot be diminished by subsequent regulations.

As regards the salary, however, and matter-relevant situations have occurred particularly related to state employees, this can be diminished by legal provisions.

In this respect Law 118/2012 concerning necessary measures for re-establishing budget balance established a 25 % reduction of state employee salaries.

The Constitutional Court ruled the provisions of this law as constitutional.

The Court retained that as the entitlement to a salary is the corollary of a constitutional right, namely the right to work, its diminishing represents a true limitation of exercising the right to work.

Such a measure can be achieved only under the conditions of the strict and limitative provisions of article 35 of the Constitution.

Related to the provisions of this law, the European Court of Human Rights has rejected as inadmissible the claims in the case of Felicia Mihăieş v. Romania (complaint no. 44232/2011 and in the case of Adrian Gavril Senteş v. Romania (complaint no. 44605/2011), ruling that art 1 of Protocol 1 to the European Convention of Human Rights had not been infringed.

The Court retained that any interference with the right to possessions has to ensure a "just balance" of the requirements of general interest of the community and those of protecting the fundamental rights of the individual.

A particularly reasonable proportionality needs to exist between the utilized means and the aim of any measure that would deprive a person of its property.

The Court, controlling the observance of this requirement, awards the state a generous assessment margin for selecting the modalities of application and assessing whether the consequences are justified by public interest, by the aim of achieving the objective of the respective law.

The Court reminded, that it had been previously called to rule whether a legislative intervention aimed at reforming an economic sector for reasons of social justice (the case of James and Others v. the United Kingdom, 21 February 1986) or at correcting the errors of a previous law, in view of public interest (National & Provincial Building Society, Leeds Permanent Building Society et Yorkshire Building Society v. the United Kingdom, 23 October 1997) respects the "balance" of the competing interests based on article 1 of Protocol 1.

In the light of the principles established in its jurisprudence, the Court remarked, that in such cases the measures criticised by the plaintiffs did not determine them to take on a disproportioned or excessive task, incompatible with the right to possessions guaranteed by article 1 of Protocol 1 to the Convention.

The Court considered that the Romanian state has not exceeded its assessment margin and has not broken the just balance of the requirements of general interest of the community and those of protecting the fundamental rights of the individual.

References

1. Popescu, A.: *Modernizing Labour and Labour Safety Legislation in the Vision of the EU. The Impact on Romanian Legislation.* In: The Bulletin of the Legislativ Council no.2/2008.
2. Ţiclea, A.: *Treatise of Labour Law*, 2nd edition. Bucureşti. Univers Juridic, 2007, p.150.
3. Uluitu, A.G.: *Aspects Concerning the Application of Article 38 of the Labour Code*, R.R.D.M. no.1/2009, p.42.
4. Ştefănescu, I.T.: *Considerations on the Application of Article 38 of the Labour Code*. Dreptul no.9/2004, p.81-83.
5. Beligrădeanu, Ş.: *Correlations of Law 192/2006 on Mediation and the Profession of a Mediator and Labour Law*. Dreptul no.10/2006, p.96-97.
6. Ştefănescu, R.I.T., Macovei, T., Vartolomei, B.: *Correlation of the Fidelity and the Non-Competition Clause Introduced into the Individual Labour Contract.* Dreptul no.11/2005, p.92.
7. Decision 494/2004 published in the Official Journal) Part I no.59/18 01 2005, Decision 322/2005 published in the Official Journal) no.702/03 08 2005, Decision 356/2005 published in the Official Journal) no.825/13 09 2005.

8. Ştefănescu, I.T. *Property Related Responsibility as Regulated by the New Labour Code*. In: R.R.D.M. no.1/2009, p.43.
9. Appeal Court Bucharest, 7th Civil Section, decision no. 1428/2007, C.P.J. 2006-2008, p.273-275.
10. Appeal Court Bucharest, 7th Civil Section, decision no. 1372/2007, in C.P.J. 2006-2008, p.310-314 and Appeal Court Alba Iulia, Labour Conflicts and Social Security Section, civil sentence no. 267/2008, Uţă L.; Rotaru, F.; Cristescu, S., Annotated Labour Code, vol.I, p.248-249.
11. Athanasiu, Al., Volonciu, M., Dima, L., Cazan, O.: *Labour Code. Commented by Articles,* p.188-189.
12. Braşov County Court, Civil Section, civil sentence no. 224/AS/2012, unpublished, Braşov County Court, Civil Section, civil sentence no. 404/AS/2012, unpublished.