

# Aspects of discrimination in salary. Study case

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## **Abstract**

*The concept of discrimination in labor relations includes all the acts or facts by which a different legal treatment applied to individuals in comparable situations is found directly or by apparently neutral actions. The infringement of the equal treatment principle will have as its main legal effect the impairment of the use of the fundamental rights and freedoms of victims of discrimination, subject to the absence of a genuine occupational requirement. In this respect, the imposition of some forms of regulation necessary to combat the disrespect of the equal treatment principle determined the first definition of the concept of discrimination, the imperative issue of the specific criteria applicable to the legal norms, their subsequent extending in the national laws to non-limitative acts, that, in the practitioners' conception, could lead to the appearance of effects specific to discrimination. In this regard, there has been a steady evolution of the concept of discrimination at national level, which has led to the possibility of extending the application field of the discriminatory criteria, giving rise to the possibility of a broad analysis of the facts which were presumed of having that effect. The article details the applicable legal rules in matters of salaries in the field of public institutions, the interpretation of the competent courts, the criteria of discrimination in the matter, and the means of reporting such facts.*

**Keywords:** *discrimination, rights, salary, criteria, institutions.*

**JEL classification:** K31

## **1. Introduction**

The legal inequality specific to the concept of discrimination is not limited to the differential treatment of persons in a comparable situation, being also found as a result of applying identical treatment to persons in different situations. International<sup>2</sup> and national<sup>3</sup> legislation in the field excludes cases of positive discrimination from the area of the discrimination concept when differentiated treatment is allowed as a practice affecting the protection of peculiar categories of persons.

From the point of view of the effects of discriminatory acts, direct<sup>4</sup> or apparently neutral actions aim either to diminish or totally or partially exclude

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<sup>2</sup> Popescu Andrei, *Dreptul internațional și european al muncii*, 2<sup>nd</sup> ed., Ed. C.H.Beck, Bucharest, 2008, pp. 340-341.

<sup>3</sup> Țiclea A, *Codul muncii*, Ed. Universul Juridic, Bucharest, 2015, p.21.

<sup>4</sup> Țiclea, A., *Tratat de dreptul muncii*, Ed. Universul Juridic, Bucharest, 2005, p. 22.

certain rights and freedoms in relation to the existence of certain criteria of discrimination.

Starting from the provisions of the Labor Code, the framework law on discrimination matters in the national system is Government Ordinance no.137/2000 on the prevention and sanctioning of all forms of discrimination, which contains a non-limiting form of regulation of the criteria applicable to this phenomenon. Thus, on one hand, we can say that in the national regulatory system the legislator considered it necessary to extend the scope of the concept of discrimination, as opposed to imposing within the international system some restrictive criteria specific to International Labor Organization conventions or European directives in the matter.

The widespread application of the discrimination criteria on the other hand, enacted in order to provide for enhanced protection of the fundamental rights and freedoms of individuals by specific legal mechanisms, can also have a counter-effect by introducing unfounded claims for damages in the face of the existence of discrimination facts with an unjustified burden on the role of the legal courts.

## 2. Forms of discrimination

As far as the forms of discrimination are concerned, their regulation was originally made at the international level, with the concepts of direct discrimination and indirect discrimination being laid down.

In Community space<sup>5</sup>, if Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions did not define the methods of direct or indirect discrimination, these are contained in Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, in Directive 2000/78/EC of 27 November 2000 on the establishment of a general framework for equal treatment in employment and occupation, and in Directive 2002/73/EC of 23 September 2002, amending Directive 76/207/EEC.

As a result, the form of direct discrimination implies applying a treatment to a person based on a criterion of discrimination, resulting in a less favorable outcome than that of another person in a comparable situation. Direct discrimination on one hand involves an action of the author to apply unfavorable treatment against a particular person or group of persons based on certain criterion of discrimination, with the aim of not granting, restraining or eliminating the recognition, use or exercise of person's rights. The specific nature of this action is the existence of the author's direct intention of provoking the situation of exclusion

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<sup>5</sup> Diaconu Nicoleta, *Dreptul Uniunii Europene, Partea specială, Politicile comunitare*, Ed. Lumina Lex, Bucharest, 2007, p. 266-267.

from other persons in a comparative situation, but also of the same treatment of persons in different situations by an active or passive form of behavior<sup>6</sup>.

Indirect discrimination on the other hand, considering the provisions of Council Directive 2002/73/EC, is considered to be the action related to the existence of a neutral provision, criterion or practice, apparently unfounded on a certain condition of discrimination prescribed by law, but which leads to similar effect as the direct discrimination.

With regard to defining the concepts of discrimination, initially in the content of Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, forms of harassment are regulated as undesirable behaviors by a particular person based on discriminatory criteria and incitement to discrimination.

Subsequently, in the national system the ways of discrimination were taken over by the framework law, namely the Government Ordinance no.137/2000 on the prevention and sanctioning of all forms of discrimination.

### **3. Legal rules applicable to public institutions regarding remuneration**

The existence of a case of discrimination in terms of remuneration requires the occurrence of differential treatment by difference, exclusion, restriction or preference applied directly or as a result of a seemingly neutral fact, relative to persons in similar and comparable situations, which will have the purpose or effect of restricting the rights of the victim of the act of discrimination.

In the case of public institutions<sup>7</sup>, rules on limiting the facts of direct discrimination in terms of payment are contained in GEO no.83/2014 on the remuneration of staff paid from public funds, amended and supplemented by Law no.71/2015, referring to the provisions of the Framework Law no. 284/2010 regarding the unitary salary of the staff paid from public funds, the interpretation of which was done through the HCCJ Decision no.32/19.10.2015.

In this respect, the provisions of art. 1 (1) of GEO No.83/2014 on the remuneration of staff paid from public funds in 2015 and other measures in the field of public expenditures stipulate that in the year 2015 the gross amount<sup>8</sup> of basic salaries/basic allowances/basic functions' salaries/salary bonuses paid to staff paid out of public funds should have the same level as the one established for December 2014. The provisions of the Ordinance will, however, apply only if the staff subject to the regulation perform their duties specific to the post occupied under the same conditions without applying the reference value and the hierarchy coefficients of the payroll classes specified in the annexes to the Law no. 284/2010 on the unitary remuneration of the personnel paid from public funds.

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<sup>6</sup> Muscalu Loredana Manuela, *Discriminarea în relațiile de muncă*, Ed. Hamangiu, Bucharest, 2015, p. 17.

<sup>7</sup> Iorgovan. A., *Tratat de drept administrativ*, Ed.All Beck, Bucharest, 2005, p. 589.

<sup>8</sup> Țiclea A., *op. cit.*, p. 332.

The exception to the application of the mentioned provisions of the Ordinance is found in Article 1 (5<sup>1</sup>), namely the provision according to which the personnel receiving a basic salary amount and bonuses lower than those set at the maximum will benefit from the same level of salary. The condition for applying the similar payment level will be related to the performance of similar activities as a function/grade/scale and gradation under the same conditions within the same public authority. Compliance with the specified requirements will allow for the application of the maximum level of salary at the level of the institution in question, which was already granted to persons with similar functions.

On the other hand, in accordance with the Ordinance on discrimination on salaries, the situation in which differentiated salaries or differentiated salary increases for certain categories of staff are laid down in accordance with the provisions of Article 1 (5<sup>3</sup>), where the difference in treatment is a requirement of professional experience, applying specific conditions to those posts is not discrimination.

The same interpretation is also found in the art. 5 (3) of GEO no.83/2014 in the case of newly employed or promoted civil servants, in which case the payment level for similar functions in the organization chart of the institution shall be the one corresponding to the 3<sup>rd</sup> payment scale used in 2010.

As regards provisions in matters of salaries, Law no.285/2010 on the remuneration of staff paid from public funds in 2011 contained a similar regulation; Article 2 stipulates that, for the year 2011, the salaries of the newly appointed staff<sup>9</sup>, of the person appointed or assigned to the same public institution/authority it will be regarded the level of payment already paid for the similar functions existing in that institution. Also, in the case of promotion of a person in positions of the same type or in function/grades, the salary will be similar to comparable payable positions in the same public institution.

The completion of the legal provisions listed above for the purpose of their interpretation and application was achieved through the HCCJ Decision no. 32/2015, which stipulates that the effective payment of the salary rights will be similar to the salary level of the similar functions existing in institution. The reporting of salary levels in order to avoid certain situations of discrimination will be made in relation to the existing salary rights in the case of a person having the same professional grade and the same period of service with the newly appointed or promoted person, in which she/he acquired the senior installments after the entry into force of Law no. 285/2010 on the remuneration in 2011 of the staff paid from public funds.

Regarding the retroactive effects of the HCCJ Decision No. 32/19 October 2015 on discrimination regarding the employment in exceptional conditions in relation to the request for recalculation of salaries based on the provisions of GEO No. 83/2014 on the remuneration of the staff paid out of public funds in 2015, in the application of Law no. 285/2010 this has given rise to interpretations, provided

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<sup>9</sup> Dimitriu, R., *Contractul individual de muncă, prezent și perspective*, Ed. Tribuna Economică, Bucharest, 2005, p. 34.

that certain legislative provisions have produced subsequent legal effects, reported to the provisions of art. 23 of Law no.554/2004 of the administrative litigation states that the final and irrevocable court decisions canceling all or part of an administrative act of a normative nature are generally binding and have power only for the future.

On the other hand, Article 75 of the Decision no. 23/2015 of the HCCJ states that “decisions made in the interest of the law are effective only for the future, as are the Constitutional Court’s decisions, which are in turn compulsory to the courts, in order to give effect to the constitutional principle of non-retroactivity, which means their effects can not affect definitive gains or legal situations already established”, but the provisions of Article 521 point 3 of the Code of Civil Procedure require that the solution of legal issues is compulsory to the court requesting the solution, and for the others from the date of its publication in the Official Gazette.

#### **4. The pre-notification procedure for the facts of discrimination**

The legal basis of the demand for persons who consider themselves to be victims of payment discrimination is the provisions of Article 1, paragraph 5, of GEO no.83/ 2014 on the remuneration of staff paid from public funds in 2015, modified and completed by Law no. 71/2015 as well as from the interpretations given to these issues through the HCCJ Decision no. 32/19.10.2015.

The effect of the provisions of GEO no.83/2014 was related to the obligation of the employing public institution to issue salary orders/provisions in order to award the percentages related to the period of service and function to all persons from the date of promotion to the maximum granted level for similar functions within the institution.

The motivation to grant salary rights was related to the pursuit of activities in similar conditions to those of other employed persons in a comparable situation, provided that they were paid at the maximum level within that institution, claiming a situation described by the applicable legal rules in the field in terms of the necessary conditions for the existence of discrimination at the workplace.

As regards the fulfillment of the preconditions for the introduction by the persons considered to be discriminated, the legal provisions represented by article 7 paragraph 1 of Law no.554/2004 of the administrative litigation, stipulated that “before appealing to the competent administrative litigation court, the person who considers himself/herself to be prejudiced by his/her right or to a legitimate interest by an act the individual administrative body must request the issuing public authority or the superior authority if there is, within 30 days from the date of communication of the act, the revocation in whole or in part thereof” within a period of 6 months. The provision is corroborated with the provisions of Article 193 (1) of the Code of Civil Procedure, namely the possibility to refer the legal court only after the preliminary procedure has been completed, when expressly provided by the special law, proof of the fulfillment of the requirement to be attached to the call for judgment. Procedurally, non-fulfillment of this condition leads to the possibility of dismissing the application as inadmissible based on the

exception of the non-fulfillment of the preliminary proceeding, such as the substantive, peremptory and relative exception.

On the other hand, regarding the fulfillment of the preliminary complaint, Law no.554/2004 refers to “the person who considers himself/herself to be prejudiced in his/ her right or to a legitimate interest by an individual administrative act”, interested in the possibility for the syndicate to introduce such an application on his/her behalf. The existence of the difference of regulation in the sense that the fulfillment of the preliminary procedure belongs only to the prejudiced person under the conditions of the Law no.554/2004, as opposed to the possibility of the petition for suing to be introduced by the syndicate for his/her members according to the Labor Code, was interpreted in the judicial practice as irrelevant, since such a complaint by the syndicate would concern the rights of all its members.

As a result, the submission of a prior complaint to the public institution by the means of the syndicate, a complaint in which general issues were raised regarding the non-nominative situation of some civil servants within the institution, was considered to be the fulfillment of the prior procedure, within the meaning of the provisions of Law no. 554/2004. In these circumstances, the public institution’s support to the effects of the notification of the syndicate, stating that, in the absence of identification of the officials concerned, their salary can not be verified, it does not constitute, in our opinion, a way of carrying out the preliminary procedure by the prejudiced parties, the inadmissibility of the call for legal action subsequently introduced by the same syndicate was considered unfounded.

The situation is also considered similar when the request for legal action is brought on his/her own behalf by the prejudiced party, provided that the notification attached to the application as evidence of the completion of the preliminary proceedings was introduced<sup>10</sup> by the syndicate. In addition, the judicial practice interpreted that if that syndicate notification did not distinguish between civil servants who were in a situation of salary discrimination, although it was not directly possible to prove whether the applicants in the request for legal action were aware at that time of the content of that notification, it may be considered as the fulfillment of the prior procedure.

### **5. The subject of the claim for damages**

The object of the application to the court for a claim alleged on the infringement of equal treatment in respect of payment in the case of appointed or promoted civil servants was based on the applicable legal provisions requiring the issuance of new salary orders/ provisions for the recalculation of the basic salary, if within the same institution there were persons paid at the highest level occupying comparable posts.

However, the admissibility of the call for trial will not be referred to the provisions of Article 30 of Law no. 284/2010 on the unitary remuneration of the personnel paid out of public funds, which assigns the competence to settle the

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<sup>10</sup> Boroi G, Stancu M., *Drept procesual civil*, Ed.Hamangiu, Bucharest, 2015, p. 148.

complaints in relation to the establishment of the individual basic salaries, bonuses, prizes and other rights for authorizing officers, for the provisions issued by employers' units, in compliance with the 15-day working day following the date of notification of the contested administrative act, as regards the facts of discrimination in matters of salaries. The complaint addressed to the authorizing officer has as object the determination of basic salaries by employer's decisions and the possibility of subsequent addressing of the prejudiced person to the administrative court after communicating the solution to the contestation is not necessary also for the introduction of special rules in order to ensure the respect for the principle of equal treatment and non-discrimination as regards salaries.

The same situation is also found and reported in accordance with the provisions of article 11 of GEO no.83/2014 regarding the remuneration of the personnel paid out of public funds in 2015, regarding the resolution of the complaints concerning the establishment of basic salaries, the monthly employment bonuses and the military positions' basic salary/salary of basic functions, competency belonging to all the authorizing officers, with the right of the prejudiced person to address to the administrative court within 30 days from the date of communication of the solution to the appeal.

The existence of inequality of treatment allowed the courts to decide the obligation of the employing public institutions to issue new salary orders/provisions in accordance with the provisions of article 1 paragraph 5 of GEO no. 83/2014 regarding the salary of the staff paid out of public funds in 2015, related to the period of time in the profession and in labor, to the held occupational grade, being granted salary differences to all the officials working under the same conditions. The recalculation of the salaries of the persons affected by the acts of discrimination at the maximum level established within that institution for the same function/grade/scale and gradation was based on the conduct of activities under the same conditions, on similar functions.

The criticism of the interpretations given in the judicial practice concerned the situations in which the courts did not in fact motivate the existence of the conditions necessary for violation of the principle of equal treatment in exercising the right to work, to obtain an equal salary for equal work and a fair and satisfactory remuneration, according to article 1 paragraph 2 and GEO No.137/2000 on the prevention and sanctioning of all forms of discrimination.

Thus, article 1 paragraph 5 of GEO no. 83/2014 on the remuneration of staff paid out of public funds in 2015 required as a condition for removing the facts of discrimination to pay the maximum amount to the staff who benefited from a basic salary and of lower bonuses than those set at maximum in the institution for each professional grade, if they operate under the same conditions, completing the provisions of Law no.284/2010 regarding the unitary salary of the personnel paid from public funds and of Law no. 285/2010 on the remuneration in 2011 of the staff paid from public funds.

From the reading of the legal provisions, it comes out that the actual activity under the same conditions as the other employees, provided similar

functions exist, is a crucial condition for finding the cases of discrimination and the application of the provisions of article 1 paragraph 5, GEO no. 83/2014.

Stating that it was possible to create by law the possibility that the personnel employed in the public institutions benefiting from a lower level of basic salary and bonuses would be paid to the maximum, provided that they work under the same conditions, in the judicial practice it was considered that the maximum salary level for each function/grade/scale and gradation can be granted, motivated by the reparation provisions of article 1 paragraph 51 of GEO no. 83/2014 applicable to all employees in the situation provided by the legal norm hypothesis.

That statement of reasons may, however, be unfounded, related to the recalculation of the applicants' salary at the maximum level established within the institution for the same function/grade/scale and gradation, provided that there is no evidence of comparable situations or similar attributions. The support also covers the hypothesis in which complainants have indicated comparable situations, which are in fact non-existent in terms of attributions within the employing public institution. The hypothesis is found when one of the petitioners occupies an unique position in the organizational chart of the public institution, and there is no possibility of a discriminatory criterion according to the provisions of article 27, paragraph 4, of GEO no.137/2000, which require proving the comparable situation. The case of discrimination is even more questionable when the court did not ask the petitioner to indicate a comparable situation in the structure of that institution, as the defendant institution proved that there was no discriminatory treatment.

## 6. Conclusions

Starting from the provisions of article 41 paragraph 4 of the Romanian Constitution regarding the principle of equal payment, article 1 (2) letter e of GEO no. 137/2000 on the prevention and sanctioning of all forms of discrimination, namely the guarantee of an equal payment for equal work, as well as the right to a fair and satisfactory remuneration, in the national legislative system through Law no.71/2015 amending and supplementing the GEO no.83/2014, the applicable salary rules were regulated, creating the possibility that the staff employed in public institutions to benefit from a basic salary level and increases to the maximum level set in that unit for each function/grade/scale and gradation if they are operating under the same conditions.

These provisions are also contained in the provisions of article 63 and 159, paragraph 3, of the Labor Code, namely the prohibition of any form of discrimination for equal work or equal value with regard to the conditions and elements of remuneration in the manner of setting and granting the salary.

Thus, Article 1 (5<sup>1</sup>) of GEO no.83/2014 stipulates that staff who receive a basic salary and bonuses lower than those set at the maximum will benefit from the same level of salary, under the condition of carrying out similar activities as a function/grade/scale and gradation under the same conditions within the same public authority.



By Decision no. 23/2016 of the High Court of Cassation and Justice, according to article 521 paragraph 3 of the Civil Procedure code it was established that, in the interpretation and application of the provisions of Article 1 paragraph (5<sup>1</sup>) of the Govern Emergency Ordinance no.83/2014, the phrase `employee at the same level` refers to the staff of the Parliament, the Competition Council, the Court of Accounts, the other public institutions listed in Article 2 paragraph 1 point a of Law no.284/2010. On the other hand, the unitary salary level of the personnel paid from public funds, which is applicable by the listed norms, is the one stipulated in article 1, paragraph 1 and 2 of GEO no.83/ 2014, completed by the Law no.71/2015.

In the same sense, according to the provisions of Article 5 (1 ^ 1) of GEO no.83/ 2014 “by salary level for similar functions is meant the same amount of the basic salary as that of the employees having the same function, after the 31<sup>st</sup> of December 2009, the amounts related to the employment salary, as well as the amounts related to the bonuses they benefited prior to this date, if the named or promoted employer fulfills the same conditions of study - medium, higher, postgraduate, doctoral - of seniority and work under the same conditions specific to the place of work at the time of employment or promotion”.

Consequently, in the interpretation of the provisions of the law, the respect of the constitutional principle of equality before the law calls for the granting of the corresponding salary level corresponding to each function, for the salaried staff within the same professional category missing relevance of the existence of different positions, if the official carries out his/her activity under the same conditions at the time of hiring or promotion. In this respect, the impossibility of identifying in the structure of the unit persons who would carry out their activity within the same department is also irrelevant, the reporting of the existence of a case of discrimination in the matter of salary taking into account the existence of a maximum level of payment of other employees with the same function, grade/scale, gradation, increases or studies.

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