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CONSIDERATIONS ON THE SALARY DEDUCTIONS

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ABSTRACT: *Salary constitutes the consideration for work performed by the employee based on the individual employment contract and one of its defining elements. In the legal labor relations, the performance of a work without payment is not possible, the individual employment contract being an essential onerous act. This study aims to examine the conditions in which the employer may operate deductions from the wages of his employees respectively if such deductions may be carried out under an agreement of the parties in the light of the current legislation.*

KEYWORDS: *salary, deduction, individual employment contract, employee*.
JEL Code: *K 31*

The term – salary comes from the Latin *salarium* originally designating the ration of salt allocated to a soldier and later the term was used to denote the price paid to free citizens who fulfilled various activities for the benefit of other persons (Alexandru , et al., 2004).

The right to salary stated in Article 23, para. 3 of the Universal Declaration of Human Rights[1] which states that *Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection*.

The content of the Convention no. 95 of 1949 on the protection of wages of the International Labour Organisation states that the term salary means, whatever its denomination or way of calculation, the remuneration or the earnings likely to be determined and established by the parties' agreement or by national law, that the employer owes to an employee under an employment contract, written or unwritten for the work performed or follows to be performed or for the services rendered or which follows to be rendered.

The Labour Code[2] defines, in article 159, para. 1, the salary as being the consideration for work performed by an employee based on an individual employment contract and Article 160 of the same law provides that the wages comprise the basic salary, allowances, bonuses and other additions.

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[1] Published in the Brochure of 10 December 1948.
[2] Republished in the Official Gazette of Romania, Part I no. 345 of 18 May 2011.

The basic salary is the main part of the wage, which is a fixed amount. The allowances are paid to employees to cover the costs they have to incur while performing service tasks or under fulfillment of certain duties (Gidro, 2013). Bonuses and salary supplements form a variable part of the salary that is paid only for the results of each employee or the time evaluated for his work performed under certain conditions (Stefanescu, 2010).

The individual salary is determined by individual negotiations between employer and employee, without having a basic salary amount below the minimum wage in that country. According to article 164, para. 1 of the Labour Code *the minimum gross salary guaranteed by the payment of the normal work time is set by the Government after consultation with trade unions and employers.*

According to G.D. no. 1017/2015[3], starting with 1 May 2016, the minimum gross salary per country guaranteed by payment is set at 1,250 lei per month[4].

The Romanian legislature does not establish the criteria considered for the setting of the minimum wage, as it has done in the Labour Code of 1972[5].

Such criteria are listed in the Convention no. 131/1970 on the setting of minimum wages, particularly in what concerns the developing countries[6], which in Article 3 reads: *the issues to be taken into account in determining the level of the minimum wages shall comprise, as far as possible and taking into account the practice and the national conditions, the following: a) the needs of workers and their families compared to the general level of wages in the country, the cost of living, the social security benefits and the levels of living of other social groups; b) the economic factors, including the requirements of economic development, the productivity and the desirability for attaining and maintaining a high level of using the labour force.*

The Constitution of Romania also comprises provisions referring to the minimum wage. Thus, article 47, para. 1 provides that *the State shall take measures of economic development and social protection, to provide the citizens a decent standard of living.* Also Article 41, para. 2 expressly states that *employees are entitled to social protection measures which concern inclusively the setting of a minimum wage per country.*

While the salary is an essential element of the individual employment contract, legislature provided for the employee a number of legal provisions in order to protect him and guarantee a minimum income to ensure living.

Thus, Article 169, para. 1 of the Labour Code expressly provides that no deduction from the salary can be operated by the employer unless in cases and conditions provided by law.

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[3] Published in the Official Gazette of Romania, Part I no. 987 of 31 December 2015.

[4] The minimum wages in EU Member States ranged from 215 EUR in Bulgaria to 1,923 EUR in Luxemburg. Thus, in countries like France, Germany, Belgium, the Netherlands, UK, Ireland and Luxembourg the national minimum wage was above 1,000 Euro per month. On the opposite side are countries like Bulgaria, Romania, Lithuania, Hungary, the Czech Republic, Latvia, Slovakia, Croatia, Estonia and Poland, where the salary was less than 500 euros per month.

[5] Article 83 of the Labour Code of 1972 providing that: *The law establishes, in line with the planned development of the economy, the national minimum wage by taking into account the level of labor productivity, national income, aiming at meeting the ever increasing requirements of the working people and their family members.*

[6] Published in the Official Bulletin no. 86 of 2 August 1975. Chooses a consolidation.

On the application of this legal text, the judge determined in a case solution that the employer can make deductions from the employee's salary without the execution procedure to be forced on the employee.

In this case the plaintiff had signed as a fidejussor a letter of commitment by which he committed to the obligation to pay, jointly, according to Article 1662 of the Civil Code of 1864, through monthly deductions from his income, the amount of money being in fact the loan contracted by the guaranteed debtor in case it will not repay the loan on terms and conditions stipulated by the loan agreement. By the same letter of commitment the plaintiff gave up the benefit of discussion and division.

As a result of the fact that the guaranteed debtor did not fulfill the obligations assumed under this letter of commitment, the employer proceeded to carry out deductions from his employee's salary, deductions that exceeded in some months, a third of his salary. No agreement that justified the salary deductions existed between the employer and the credit institution.

Since the employee considered the deduction made in this way unlawfully, he addressed the court with an application by which he requested the return of all amounts withheld. The first court admitted the application of the applicant stating that the defendant acting as an employer started making deductions from the salary although no legal procedure of enforcement was started and therefore the defendant was not a garnishee[7].

Consequently, as the defendant - employer had no legal basis to withhold any amount of the wages of the employee, according to Article 170 and Article 171, para. 1 of the Labour Code, the court ordered the defendant to refund this amount to the applicant.

The decision was fully amended in the first appeal, the court assessing the deductions from the applicant's salary were made in full compliance with the conditions set out in the Civil Code regarding surety and the waiving of the benefit of division and discussion, without the need for foreclosure proceedings[8] to recover these amounts. This is because all the Contracting Parties have agreed to operate deductions directly from the plaintiff's guarantor salary - in case of rates not paid by the borrower without specifying in the content of the documents signed by the parties the fact that they are required to recover these amounts by foreclosure. Therefore, since the documents concluded between the parties account for law, by virtue of Article 969 of the Civil Code of 1864, incident in question, the court is called upon to respect them if they learn that they have been concluded lawfully.

We believe that the judgment given by the court of appeals is an unlawful judgment, the parties can not depart by their willingness from the laws concerning public order and morals, the way Article 5 expressly provides in the Civil Code of 1864.

In this case, given that the guaranteed debtor did not fulfill the obligation to pay, the credit institution had the possibility to request the foreclosure under the credit agreement which is enforceable in accordance with Article 120 of G.E.O. no. 99/2006[9]. According to

[7] The Judgment of the Tribunal of Mureș no. 1332/2015 issued in the Case no. 994/102/2015, unpublished.
[8] The Decision of the Court of Appeal Mures no. 189/A/2016 delivered in the Case no. 994/102/2015, unpublished.
[9] Published in the Official Gazette of Romania, Part I no. 1027 of 27 December 2006.

the legal text, *credit agreements, including personal or collateral contracts, concluded by a credit institution constitute writs of execution.*

We appreciate that the mere statement of the guarantor fidejussor contained in the letter of commitment does not meet the requirements to be qualified as surety, this being a consensual agreement, bilateral, being validly completed by the agreement between the fidejussor and the lender.

Even in conditions where one would appreciate that we are in the presence of a valid personal security contract, it could not be enforced until after a request for enforcement under conditions prescribed by Article 664, para. 1 of the Civil Procedure Code[10]. After receiving the request, the bailiff, by the conclusion, will rule its registration and will request a declaration of enforceability by the enforcement court. In this regard, it should be stressed that according to amendments brought to the Civil Procedure Code by Article VII of G.E.O. 1/2016[11], the enforceability of executive orders, other than judgments, are no longer required.

If the court by verifying the declaration of foreclosure noted that there was no impediment provided by Article no. 666, para. 5 of the Civil Procedure Code and would have permitted the enforcement, only in this case we consider that the foreclosure – garnishment was possible, under the conditions provided by Article 781 of the Civil Procedure Code. The procedural provisions provide in this case the need to issue a garnishment notice to the employer who receives the capacity of a garnishee.

The guarantor fidejussor in this situation would have had the opportunity to appeal against enforcement, as provided by Article 712, para. 1 of the Civil Procedure Code against enforcement, by which he could have raised *de facto* or *de jure* reasons relating to the merits contained in the enforceable title[12].

In cases of enforcement of a judgment by garnishment, Article 729, para. 1 letter b of the Civil Procedure Code expressly provides that wages can not be tracked only to the extent of one third. Only if the debtor is wanted for amounts due in respect of maintenance obligation or child support or for multiple prosecutions on the same amount, keeping track may not exceed half of the net income of the debtor, regardless of the nature of the claims, unless the law provides otherwise.

We believe that an agreement between employer and employee by which the first agrees for having withheld deductions from his salary given that the foreclosure did not started is not legal, the legal provisions relating to enforcement and the limits it can be done being eluded.

In this respect it should be stressed that the employee enjoys a special protection in terms of the rights that arise from the individual employment contract, compared to the possible abusive actions with abusive features from the employer which has a dominant position in its relations with the employee.

Thus, according to Article 38 of the Labour Code, employees can not waiver their rights recognized by law. The same legal text provides that any transaction which seeks waiver of the rights recognized by law to employees or the limitation of these rights is invalid.

[10] 2nd republishing in the Official Gazette of Romania, Part I no. 247 of 10 April 2015.
[11] Published in the Official Gazette of Romania, Part I no. 85 of 4 February 2016.
[12] According to Article 713, para. 2 Civil Procedure Code.

The legislature also provided express provisions regarding salary deductions, stating very clearly that such deductions can not be made unless the debt employee is due, liquid and payable and has been established as such by a final and irrevocable judgment[13].

As for the provisions of Article 257 of the Labour Code, they allow the employer to proceed with deductions from his employee's salary, but obviously these deductions can not operate except on the basis of a judgment or other enforceable tile. This conclusion emerges clearly from the interpretation of this article corroborated with the provisions of Article 258, para. 1 of the Labour Code according to which, if the individual employment contract is terminated before an employee compensates the employer and moves to another employer (...) the salary deductions are made by the new employer or the new institution or public authority, as appropriate, based on the writ of execution sent by the injured employer. It is therefore manifestly unlawful the issuance of a unilateral decision of imputation by the employer and withholding deductions based on this decision[14].

Regarding the applicability of Article 254 of the Labour Code relating to the financial liability of employees we consider that they do not constitute an exception to the rules we have argued previously.

Thus, in accordance with Article 254, para. 3 of the Labour Code *If the employer finds that its employee caused a loss because of fault in connection with his work, he may require the employee by fact-finding and damage assessment report, the recovery of the consideration thereof, by the parties' agreement, on a term which shall not be less than 30 days from the date of communication. The countervalue of damages may not exceed the equivalent of five minimum salaries per economy.*

These provisions regulate the ability of the parties to amicably settle any disputes that may arise as a result of damage brought by an employee to the employer. However, even if the parties conclude by agreement a convention or the employee assumes a payment commitment, as they are not enforceable titles, they clearly do not entitle the employer to proceed to making deductions from salary. But if the employee subsequently no longer complies with its obligations, the employer can also appeal to the court by using the pre-constituted document when amicably assessing the damage with the employee.

In conclusion, within the present state of our legislation, deductions directly from the employee's salary are not possible without an enforceable title and the start of a foreclosure against the employee, even if he would consent to this action by signing a written agreement[15].

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[13] Article 169, para. 2 of the Labour Code. In case of plurality of the employee's creditors, according to Article 169, para. 3 of the Labour Code the following order will be followed: a) support obligations, according to the family Code; b) Contributions and taxes to the State; c) damage caused to the public property by illegal acts; d) covering other debts.

[14]See the Judgment of the Tribunal of Iasi no**.** 2526 of 17.12.2010 published http://infodosar.ro/speta.php?id =19289, the Judgment of the Tribunal of Călăraşi no. 2526/2010, the Judgment of the Tribunal of Bacău no. 1260/2013.

[15] The laws of other states, such as Switzerland, salary deductions may be made by the employer without exceeding 10% of a working day salary, or a total of a working week salary. Deductions can be made if there is an agreement to this sense, a usage or a provision in the wording of the individual or collective labor contract. Deductions exceeding this limit is possible, if so specified in the wording of the individual or collective labor. See Article 323. a2 of the Swiss Civil Code at https://docs.lexsear.ch/ch/cod/220/6?l=fr.

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