

Case Reports

2016/5

Government order to suspend civil servants' pension payments discriminatory (HU)

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Summary

The European Court of Human Rights (ECtHR) has recently ruled on a Hungarian law suspending payment of civil servants' pensions for the period during which they are employed in certain areas of the public sector. The ECtHR found this law to be discriminatory as it breaches Article 14 of the European Convention on Human Rights (ECHR) read in conjunction with Article 1, Protocol 1. Hungary, as the respondent State, is to pay pecuniary and non-pecuniary damages and procedural costs and expenses to the applicant, Mr Gyula Fábíán. The judgment was delivered on 15 December 2015 and, if not appealed to the Grand Chamber, will cease to be appealable on 15 March 2016.

Facts

Mr Fábíán, born in 1953, was employed by the Budapest municipality. He was hired in 2012 at age 59. At that time he was already in receipt of early retirement benefits accrued under the social security system.

At the end of 2012 the Hungarian Government introduced measures to reduce the number of people who have retired under the social security pension scheme but who are simultaneously employed in the public sector.

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1. Government Decision 1700/2012. (XII. 29.) on pension politics principles in the civil sector, issued on 29 December 2012.

First, the government issued a normative action plan¹ with three objectives: (i) the existing employment contracts of civil servants who had reached their pension age² and had the necessary number of pensionable service years³, were to be terminated; (ii) the vacancies thus created were to be blocked; and (iii) no employment, assignment or subcontract agreement was to be concluded with those described in point (i).

Secondly – in line with the said action plan – the Act on Pensions⁴ was amended as of 1 January 2013. According to this new law, retirement benefits (old-age pensions) must be suspended while a civil servant is employed within certain categories of the public sector (e.g. teachers, doctors, judges or servants in municipalities). The new law provided a grace period of six months for those already employed in the public sector when the new law entered into force.

The objective of the new pension policy was threefold. First, it was necessary to reduce public debt. Given that out of a total population of just under ten million and a total of 4.2 million active employees, no fewer than 2.9 million individuals are in receipt of a social security pension⁵, the measure was designed to generate substantial savings. The government calculated that it would save between 23 and 27 million Euro annually⁶. The second reason for the new pension policy was that it would reduce the number of retired employees on the government's payroll (e.g. teachers, doctors, judges or members of the armed forces). Thirdly, it would free up jobs for young people and thus help reduce unemployment amongst young people, which in Hungary is estimated to lie around at 15%⁷.

The measure described above presented Mr Fábíán with a difficult choice: either give up his job or accept that the retirement benefits he had accrued in a previous

2. In Hungary the pension age is gradual for those who were born between 1952 and 1956 (62 years to 64 years). For those born in or after 1957, the pension age is 65 years.

3. At least 20 years of service.

4. Section 83/C of the Act LXXXI of 1997 on Social Security Pensions (applicable as of 1 January 2013).

5. In Hungary it was not uncommon for large groups of government employees, such as the military, to retire in their forties or fifties. Approximately 29% of all pensioners are under retirement age. Although, in order to become eligible for retirement benefits, it is necessary to lose one's job, nothing is to prevent an employee from taking up a new job after having become eligible for pension benefits and thus having two incomes.

6. The actual savings in 2013 and the first half of 2014 totalled 31 million euro.

7. The overall unemployment rate is around 6% in Hungary.

job would not be paid out as long as he worked as a civil servant. Either way he stood to lose about half of his income.

Mr Fábíán decided to retain his job. Accordingly, his pension disbursement was suspended as from 2 July 2013. He filed a complaint in relation to the suspension of his retirement benefits. Unsurprisingly, given that both the pension authorities (first and second instance) and the reviewing court had to apply the new law, which was clear, he lost his case in three instances. He then applied to the European Court of Human Rights (ECtHR).

Before continuing, it should be noted that, while Mr Fábíán's case was ongoing, the Commissioner for Fundamental Rights lodged a complaint in relation to the new law with the Constitutional Court for constitutional review. This was based on Articles XII and XIII of the Fundamental Law (the Constitution of Hungary), which provides that everyone shall have the right to freely choose his or her work and that everyone shall have the right to own and inherit property. The complaint was also based on the requirement of proportionality, which is violated if significant changes are introduced into the pension system in short order. The Constitutional Court is expected to rule on the matter soon.

Judgment

Mr Fábíán advanced two arguments as to why the new law violated the European Convention on Human Rights (the ECHR): it robbed him of property and it was discriminatory.

The first argument rested on Article 1 of the First Protocol to the ECHR. It provides that every person is entitled to the peaceful enjoyment of his possessions and that no one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. As Mr Fábíán saw it, he had accrued certain pension rights during his previous job and these were being taken away from him retroactively, hence in breach of Article 1. He referenced ECtHR case law to the effect that any encroachment on property must be convincingly justified, a mere reference to the general interest without concrete facts or circumstances justifying the restriction being insufficient. Moreover, given that the number of people affected by the new law was no more than a fraction of the overall number of pensioners in Hungary, any savings made on the pension of such a small group could not substantially reduce the public debt.

Mr Fábíán's second argument rested on Article 14 ECHR⁸: "*The enjoyment of the rights and freedoms set*

8. More precisely: Article 1 of the First Protocol read in conjunction with Article 14.

forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status". Mr Fábíán pointed out that the new law was discriminatory in several ways. First, it treated workers in the public sector and workers in the private sector unequally⁹. Second, the new law did not apply to everyone in the public sector, for example, ministers and mayors were exempted. Thus, there was unequal treatment between different groups of public servants.

The Hungarian government defended the new law by arguing that it did not place a disproportionately heavy burden on employees such as Mr Fábíán, as they are free to retain their pension and seek alternative employment in the private sector. Strangely, the government did not put forward any argument for exempting certain categories of civil servant from the new law.

The Court held that being denied payment of pension on grounds of being simultaneously employed in the public sphere can be considered as "*other status*" within the meaning of Article 14. It went on to note that, according to its previous case law, a difference of treatment is discriminatory if it has no objective and reasonable justification. That is the case where the differential treatment does not have a legitimate aim or "*if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised*". In this regard, the Court observed that the Hungarian government had failed to explain why not all public employees were subject to the new law (ministers and mayors, for instance, being exempted, despite being in an analogous position). Although reducing public expenditure has been accepted by the ECtHR as a legitimate interest, in this case, the Court could not see any justification for the difference in treatment.

Finally, the Court considered that while it is true that only public employees are susceptible to receiving double income from public sources, the government's core argument that no social security pension should be paid to those who are employed and therefore have no need of a substitute salary, should in fact hold equally true for those retirees who then take up employment in the private sphere. Seen from that angle, pensions paid out to retirees employed in the private sphere may also be regarded as redundant public expenditure.

The Court's conclusion was that Hungary has breached Article 14. In the light of this finding, it was not necessary to examine whether Hungary had also violated Article 1, Protocol 1.

9. A similar rule prohibiting being simultaneously employed and drawing a retirement pension also existed in the private sector, but only in respect of employees with a salary in excess of 12 times the statutory minimum wage. This was later raised to 18 times the minimum wage.

Commentary

In recent years, Hungary has been criticised repeatedly for violating human rights. In 2011, the Constitutional Court annulled a law that allowed civil servants to be dismissed without reason^{10,11}, which was also confirmed in 2012 by the ECtHR, holding that that law violated Article 6 (1) ECHR, which entitles everyone to a fair and public hearing within reasonable time by an independent and impartial tribunal established by law¹². In the same year, 2012, the Constitutional Court annulled a law that allowed judges to be dismissed at age 62; the law had to be withdrawn and the judges who lost their positions were reinstated. Also in 2012, the ECJ held that law to be incompatible with Directive 2000/78¹³.

The everyday effects of the *Fábián – v – Hungary* case are not yet known, as the mandatory suspension of pension payments to individuals employed as civil servants is still in force. The judgment of the ECtHR is not yet final and the Government is weighing up whether to file an appeal to the Grand Chamber. Further, the Constitutional Court has not yet made its decision on the new law.

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Subject: discrimination, other grounds

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10. Decision of the Constitutional Court Nr. 29/2011 (IV. 7.) AB

11. See ECJ 10 October 2013 in joined cases C-488/12 to 491/12 and C-526/12 (ECJ lacks jurisdiction to answer questions on the interpretation of the Charter).

12. See ECtHR 19 November 2012 *K.M.C. – v – Hungary*.

13. See ECJ 6 November 2012 in case C-286/12 for failure to fulfil obligations; *European Commission – v – Hungary*.