

THE REASONS FOR DISCRIMINATION IN LABOUR LAW

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Abstract

The labour law as a system of law distinguishes prohibition of discrimination of employees according to individual reasons for discrimination. The reasons for discrimination are specific features of a personality that haven't got exact legal definition yet. The reasons for discrimination are in relation to the principle of equal treatment. This principle doesn't mean the equal treatment of persons in same situations only, but exercising of that basic human right expresses meanwhile the demand for public authorities to treat the authorized bearers of human rights in different situations variously. The aim of this article is the explanation of chosen reasons for discrimination in the system of labour law and also brief explanation of the prohibition of discrimination in employment relationships. This article also contains explanation of terms such as direct discrimination and indirect discrimination.

Key words: *Reasons for discrimination. Labour law. Discrimination. Direct discrimination. Indirect discrimination.*

Introduction

Equality is in general not only criterion for the execution of rights and their legal protection (legal equality), but equality also needs to be seen as a basic human right. Equality as an important employment principle is tightly connected with principle of equal treatment in industrial relations. Principle of equal treatment as one of the most important principles of Labour law should get reflected in all the measures, decisions and instructions of the employer. On the basis of the aforementioned principle, the employer is bound to define in his internal regulations (internal normative legal acts) common same employment conditions for all employees or to define these conditions according to certain factual criteria.

Principle of equal treatment does not only mean equal treatment of people in the same situations, but application of this basic human right also expresses request for the public authorities to treat authorized bearers of human rights differently in different situations. Discrimination could be observed if states without any objective and sensible justification don't treat differently persons whose situation obviously is different. According to the European Court of Human Rights, the difference in treatment is discriminatory, if there is no objective and adequate reason for differentiation, if it does not enable following of a legitimate goal or if the proportional relation between used means and the goal to be achieved is not adequate.

Breach of the equal treatment principle in employment relationships can be observed not only within compliances of claiming nature, but it also may include facultative compliances of the employer (in connection with social policy of the employer).¹

Breach of this principle may be witnessed, if certain features characteristic for particular employee are observed. Whereas following features are relevant: gender, age, religion, disability or sexual orientation. European Union Law considers prohibition of discrimination because of employment relevant for example for temporary employments or for employments for shorter period of the week.

1. Prohibition of discrimination in industrial relations

General prohibition of discrimination in industrial relations is anchored in Article no. 1 of basic principles of Labour Code and in § 13 of the Act no. 311/2001 Coll. as amended (hereinafter just “LC”) as well as in Antidiscrimination Act² in conditions of Slovak republic. In this document the reasons for discrimination are listed and understood more than standardly, unlike requirements that are based on EU regulations on equal treatment.

According to regulation of Council no. 2000/78/EC, persons who are discriminated because of their religion or faith, disability or sexual orientation should be protected by adequate legal means.³

Article no. 2 of the subjected regulation explains terms connected with discrimination. Under the term principle of equal treatment one has to understand that there is not supposed to be any direct or indirect discrimination based on any of the reasons listed in article no. 1 of this regulation.

However, there are certain exceptions from discrimination prohibition. In case of direct discrimination, different treatment is acceptable only if exception, defined directly in legal regulations is concerned. In case of indirect discrimination, the EU law under certain conditions accepts exceptions, if those are based on relevant reasons, mostly economic ones. “Whereas EU law requires that the goal to be reached by granting such exceptions was relevant, the tool helping to achieve this goal was adequate and interferes with equal treatment principle only in an inevitable extent.” [1]

Equal treatment exceptions have to comply with particular legal characteristics, not only concerning their nature, content, but also plurality. It also concerns cases of positive discrimination that too is considered to be an equal treatment exception. However exceptions have to lead towards legitimate, relevant goal. According to jurisprudence of ECHR, with the meaning of article 14 of the Convention on protection of human rights and fundamental freedoms, discrimination is observed, if persons being in similar situations are treated differently without any objective and sensible reasoning of such treatment. Objective and sensible reasoning follows legitimate goal and respects principle of adequacy between used means and goal to be achieved.

¹ Rights of individual employees may result from employment contract, collective agreement, wage regulations or other regulations that are inevitably connected with job performance

² Here we speak of no. 365/2004 Coll. on equal treatment in particular spheres and on protection from discrimination and on change and amendment of certain acts (Antidiscrimination act). The aforementioned act is common legal basis for adherence to equal treatment principle within all legal order of Slovak republic including Labour law

³ See details of paragraph 29 of Council regulation 2000/78/EC from 27th of November 2000 that defines general frame of equal treatment for jobs and occupations.

2. Direct and indirect discrimination

For better understanding of discrimination reasons, it is necessary to clarify terms: direct and indirect discrimination.

“Regulations understand direct discrimination as situation, in which one person is less favourably being, was or would be dealt with as with another person in comparable situations because of particular prohibited reason (features) as gender, ethnic or racial reasons, age, faith, religion (world view), sexual orientation, disability.” [2]

The merits of the term direct discrimination are based on following content elements:

- a) a person is being, was, would be less favourably dealt with than with other person
- b) causation principle
- c) illegitimate reason of less favourable different treatment [3]

On the other hand, indirect discrimination is concerned, if seemingly neutral regulation, criterion or practice would place persons of certain religion or faith, with particular disability, certain age or certain sexual orientation into disadvantageous position in comparison with other persons under conditions stated in article 2 of the regulation no. 2000/78/EC.

3. Brief characteristics of individual discrimination reasons

Discrimination reasons may be characterized as certain features of a person with no legal determination until now. According to the current jurisprudence of the EU Court of Justice, there is no doubt that these are terms of EU law. It means that national legal regulations of member states cannot define these reasons differently for the purposes of their own legislations.

Following belongs to the basic discrimination reasons:

- 1./ sex and gender**
- 2./ sexual orientation (identity)**
- 3./ racial and ethnic reasons**
- 4./ religion, faith and world view**
- 5./ disability**
- 6./ age**

Sex and gender

“A forbidden discrimination reason according to the regulation 2006/54/EC is a gender. The regulation protects not only women and men, but also transsexuals” [2] Principle of equal treatment therefore applies also to change of the gender.

However, different treatment because of gender is acceptable, if being of certain sex is relevant for performance of particular job or for conditions of such performance in greater or decisive extent. The goal and purpose of different treatment must be legally correct and the way of pursuance adequate. Here, mainly such kinds of jobs or way of their performance are concerned, where authenticity is required (model, actor, actress, sale assistant in women lingerie shop). According to the newer jurisprudence of the EU Court of Justice, it is not acceptable that member states claim exceptions from the equal treatment principle because of sex, by listing professions as such. Here, always certain working practices – because of their nature and way of their performance – have to be concerned. [2]

Sexual orientation (identity)

The term – sexual orientation – is understood as preference of life partner choice. Sexual orientation names preference when making sexual choice, which may be heterosexual, bisexual or homosexual. One should understand it as stable orientation in partner choices

(man or woman or both sexes). Discrimination because of sexual orientation is not a discrimination because of sex, but is a standalone discrimination feature. Prohibition of discrimination because of sexual orientation also includes prohibition of discrimination because of sexual orientation of one's life partner. Although discrimination prohibition because of sexual orientation applies mainly to protection of homosexual partners, the regulation prohibits also discrimination of heterosexual partners. Content differentiation between a sex and sexual orientation is according to jurisprudence of EU Court of Justice still unclear. **Subject to protection according to EU law is not anomalous behaviour of sexual nature as for example paedophilia or other anomalous sexual practices.** [3]

Racial and ethnic reasons

It is also necessary to keep in mind that adherence to principle of equal treatment according to EU law, when it comes to **racial and ethnic origin**, has broad and factual extent, as the individual ethnic groups have their common long history, traditions and ethnic groups as such often overreach borders of one nation. Respect is to be taken not only on jobs and occupations, profession education, but also on social protection including social security law, health care, social benefits or education.

Religion, faith and world view

Freedom of thinking, conscience and religion according to European Court of Human Rights composes of right to have own opinion and right to express one's own opinion. The right to have opinion is understood to belong to own conviction and religious faith sphere. It protects the inside of a person and cannot be restricted. A person can express own religious opinion in public or in private in any form. The right to express religious opinion can be restricted because of public order. [4]

Disability

The EU Court of Justice in one of its decisions deals with the term **disability** with the meaning of equal treatment principle. In a legal case Chacón Navas stated that disability is to be understood as „**restriction resulting mainly from physical, mental or other psychical disability that does not allow disabled person to participate on profession life**“ [2] The European Court of Justice emphasized that the term *disability* is not identical with the term *illness*. In order to claim that disability is concerned, it has to be probable that this restriction is going to be a long term one. The main problem in connection with the prohibition of discrimination of disabled persons rests in perception of society, in prejudices, in segregation and other forms of disadvantaging of these persons.

The fulfilment of merits of disability presumes:

- a) a physical, mental or psychical disability of long term nature
- b) damage to health that disadvantageously reflects in personal and social life of disabled person [3]

Discrimination because of disability is being observed not only because of disability of the employee himself, but also in cases, when healthy employee takes care of a family member with disability.

Age

Limitation of age as a subject to discrimination is a very big problem, because age is changing constantly. The regulation 2000/78/EC not only covers prohibition of discrimination in higher age, but also prohibits discrimination of younger persons. In case of discrimination prohibition because of age not only protection of older persons is concerned, but also protection of younger ones is covered. Direct discrimination because of age could be observed in case of anchoring of age limits for wages.

“Exceptions from equal treatment principle because of age can be anchored in internal legislation of member states on a basis of adequacy principle. Adherence to adequacy principle is subject to control by EU authorities“ [3]

Conclusion

Although currently there is no sufficient jurisprudence of EU Court of Justice to some discrimination features, the decision making process of EU Court of Justice within this field got increased in recent years. The EU Court of Justice understands all the analysed discrimination features as legal terms of EU and does not enable EU member states to define these terms independently in their own legislations.

Within decision making process of the Slovak republic courts it is therefore important to interpret discrimination features correctly in order to decide correctly in particular case, if direct or indirect discrimination was observed.

Bibliography

[1] BARANCOVÁ, Helena. 2015. *Zákonník práce – Komentár*. 4. vyd. Bratislava: Nakladateľství C. H. Beck, 2015. 1240 s. ISBN 978-80-89603-31-2.

[2] BARANCOVÁ, Helena. 2014. *Ochrana zamestnanca pred diskrimináciou*. Bratislava: Sprint 2 s. r. o., 2014. 280 s. ISBN 978-80-89710-06-5.

[3] BARANCOVÁ, Helena a kol. 2012. *Základné práva a slobody v pracovnom práve*. Plzeň: Vydavateľství a nakladateľství Aleš Čeněk, s.r.o., 2012. 380 s. ISBN 978-80-7380-422-0.

[4] BARANCOVÁ, Helena. – SCHRÖNK, Robert. 2013. *Pracovné právo*. 2. vyd. Bratislava: Sprint 2 s. r. o., 2013. 598 s. ISBN 978-80-89393-97-8.

[5] Act no. 311/2001 Coll. *Labour Code* as amended