

APPROACH TO DISCRIMINATION WITHIN WORK RELATIONS

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Abstract

The subject of this paper is wholesome, current is approached by the internal legislation of the Romanian state, by community law and by other international regulations that prohibit discrimination within work relations.

This paper briefly presents the theoretical concepts of the discrimination notion, the principles of non-discrimination and the legislative acts that regulate this principle both nationally and internationally and concludes with a short analysis of the mobbing phenomenon as well as with a series of conclusions taken from the specialty literature on this subject.

Keywords: *discrimination, equality of chance, the principle of non-discrimination, mobbing*

INTRODUCTIVE CONSIDERATIONS

Discrimination is any difference, exclusion or preference based on race, nationality, ethnicity, language, religion, social class, convictions, gender, sexual orientation, age, disability, noncontagious chronic disease, HIV infection, membership to a disadvantage category as well as any other criteria that has the purpose or effect restraining, removing recognition, use or exercise, inequality conditions, of the human rights or fundamental liberties or rights recognized by law within the politic, economic, social and cultural field as well as any other fields of public life. [1, art. 2]

Discrimination has several forms: direct discrimination, indirect discrimination, harassment and instigation to discrimination.

The most frequent types of discrimination are:

- age discrimination,
- wealth discrimination,
- discrimination based on political conviction,
- nationality discrimination,
- racial discrimination,
- gender discrimination,

- discrimination based on religion,
- discrimination based on sexual orientation.

Discrimination can mainly appear in the following fields:

- closure, suspension, modification or termination of the work relation,
- establishment and modification of work attributions,
- establishment and modification of the workplace.
- establishment and modification of salary,
- granting salary rights or others than the ones regarding salary,
- applying disciplinary measures,
- exercising the right to adhere to a union and the access to its facilities,

Any other condition for work performance according to the legislation in force.

Work relations function on the principle of equality of treatment towards all employees and employers, a principle that is supported and provided by the Labor Code.

According to the provisions of the Labor Code, any direct or indirect discrimination towards an employee based on gender, sexual orientation, genetic features, age, nationality, race, color, ethnicity, religion, political view, social origin, disability, family situation or responsibility, union membership or activity, is forbidden.

The Labor Code clearly differentiates direct and indirect discrimination.

There are considered direct discrimination the exclusion, difference, restriction or preference that have a purpose or effect not granting, restraining or removing recognition, use or exercise of the rights provided by the Labor Legislation. [2, art.5, paragraphs 1-2]

The principle of equality of treatment is regulated by the Labor Code. [2, art.5] According to the European provisions regarding the prohibition of any form of discrimination, the current code provides that any direct or indirect discrimination towards an employee based on gender, sexual orientation, genetical features, age, nationality, race, color, ethnicity, religion, political view, disability, family situation or responsibility, union membership or activity is forbidden.

Moreover, the code also classifies as direct discrimination the exclusion, difference, restriction or preference based on one or more of the criteria mentioned above that have the purpose or effect of not granting, containing or removing the recognition, use or exercise of the rights provided by the Labor Legislation. Direct discrimination is

also represented by actions that are apparently based on other criteria than those mentioned above but has the effects of direct discrimination. [3,29]

Also, the speciality legislation shows that indirect discrimination occurs in the situation where a disposition, criterion or practice that is apparently neutral, especially disadvantages people of a certain gender as opposed to people of another gender excepting the cases in which this disposition, criterion or practice is objectively justified by a legitimate purpose and the means of achieving this purpose are appropriate and necessary. [4, art.4, letter b.]

The principle of non-discrimination within work relations is closely connected by the principle regarding the restrict us of the right to work or labor liberty. [5,21]

The principle of equality or non-discrimination must be equally kept by every individual or judicial person.

Starting with the provision of the Romanian Constitution, the fundamental law of the Romanian state, a series of normative acts from the field have applied this fundamental principle in almost every issue occurring within work relations.

The Constitution, the fundamental law of the Romanian state, establishes the non-discrimination principle thusly: Romania is the common and indivisible country of all its citizens, regardless of their race, nationality, ethnicity, political view, wealth or social origin. [6, art. 4, paragraph (2)]

The Constitution also states that every citizen is equal before the law and the public authorities, without privilege or discrimination. [6, art.16,paragraph (1)]

Starting with this provision the legislator states that the right to work cannot be constrained and every citizen is free to choose its own profession, craft or occupation and is ensured social protection measures that regard their security and health, the work schedule of women and youth, weekly rest, paid leave, work performance under special circumstances, professional training as well as other situations established by law. [6, art.41]

From the need of ensuring the equality of every citizen before the law, the state authorities, the Romanian Constitution provides that the state recognizes and ensures for people of national minorities, the right to keep, develop and express their ethnic, cultural, linguistic and religious identity. [6, art.6, paragraph (1)] The protection measures taken by

the state in order to keep, develop and express the identity of people of national minorities must be in accordance with the principles of equality and non-discrimination in relation with the other Romanian citizens. [6, art.6, paragraph (2)]

The public functions and dignities, civil or military, can be taken, according to law, by people who have Romanian citizenship and live within the state. The Romanian state ensures the equality of chance between men and women for occupying these functions and dignities. [6, art. 16, paragraph (2) and (3)]

In the context of the constitutional provisions, imposing the exigencies of the state of right implies taking more detailed internal regulations that regard work relations. Thusly, according to the provisions of the specialty regulation of our country regarding the prevention and sanction of all forms of discrimination, the principle of non-discrimination is treated as a mean for exercising rights. It is thusly shown that the principle of equality among citizens, the exclusion of privilege and discrimination are especially ensured during the exercise of the fundamental human rights and liberties.

Among them there are:

- the right to equal treatment in court and before any other judicial organ;
- social, economic and cultural rights;
- the right to work, to freely choose an occupation, to have equitable and satisfactory work conditions;
- the right of protection against unemployment;
- the right to equal salary for equal work;
- the right to health, to an equitable and satisfactory remuneration;
- the right to found unions and to adhere to a union. [1, art.1]

THE SOCIAL REACTION REGARDING DISCRIMINATION

The provisions regarding the equality of treatment within work relations are also debated and provided in Law no. 202 of April 19th, 2002, regarding the equality of chance and treatment between men and women, pursuing the elimination of all discrimination forms based on gender within all the fields of public life in Romania.

Thus, from the legal provisions mentioned above, it is observed that the elimination of discrimination forms is done by:

- preventing any type of discrimination by imposing special measures and affirmative actions in order to protect the disadvantaged people that do not benefit from equality of chance;
- mediation by amiably solving conflicts that emerged after some discriminatory actions;
- punishment of discriminatory behavior. [1, art.2]

In the case of public clerks, their work relations belong in the interference zone between labor law and public law (mainly administrative law). [5,123] Within the law regarding the status of public clerks there are provisions regarding the prohibition of any form of discrimination among public clerks based on politics, union membership, religious belief, ethnicity, gender, sexual orientation, material status, social origin or any other criteria of similar nature. [7, art.27, paragraph 2]

The Romanian legislation regarding equality of treatment and the prohibition of discrimination within work relations is connected to the requirements of the European Union ever since Romania's adherence in 2007 and it is completed by a series of normative acts meaning the implementation of European Directives within the national legislation. Thus, on the European level, there is a sole system of laws referring to discrimination.

Our country must conform its labor legislation with the community regulations, firstly with the ones nominated in the White Book in 1995 for preparing the associated countries of Central and Eastern Europe for adhering to the internal market of the Union. [5,30-31]

Every person has the right to equality before the law and to protection against discrimination, these representing an universal right recognized by the Universal Declaration of Human Rights, by the Convention of the Organisation of the United Nations regarding the elimination of all forms of discrimination towards women, by the pacts of the Organisation of the United Nations regarding civil and political rights and economic, social and cultural rights and by the European Convention of Human Rights and the fundamental liberties signed by every state.

The principle of non discrimination is consecrated by several international sources of labor law such as: the European Convention of Human Rights and fundamental

liberties adopted by the European Council, the European Social Charter, the acts adopted by the International Organization of Labor [8], The Charter of the fundamental rights of the European Union, the international Pacts regarding the human rights approved by the General Gathering of the Organization of the United Nations. [9] The Conventions that, by their judicial force, firmly make the states that have adhered to respect and promote those rights, are of great importance. [5,47]

The European Convention on Human Rights, also approved by Romania in 1994, has been put into force in 1953. This provides that the exercise of the rights and liberties that are recognized by the convention must be ensured without discrimination based on religion, political opinion or any other opinion, national or social origin, membership to a national minority, wealth, birth or any other situation, the enumeration of this article representing not a limitation but a mere example. [10, art.4]

Thus, the legislative provision states that for an effective exercise of the right to equality of chance and of treatment regarding employment and profession without discrimination regarding gender, the parts are obliged to recognize this right and to take the appropriate measures in order to ensure and promote its application within the following fields:

- the access to employment, protection against dismissal and professional reintegration;
- professional orientation and training, professional requalification and rehabilitation;
- employment and labor conditions, including remuneration;
- Career evolution, including promotion.

The revised Charter has been named „The Social Charter of the XXIst century". [5, 228-229]

By the meaning of the Convention no. 111/1958, discrimination means: any difference, exclusion or preference based on race, color, gender, religion, political conviction, descent, nationality or social origin, that has the effect of suppressing the equality of opportunity or treatment regarding employment and the exercise of the profession [8, art.1, paragraph (1)]

At the same time, the International Organization of Labor forbids discrimination regarding employment and imposes certain standards for protecting people against discrimination.

For the first time in the history of Europe, the Charter of fundamental rights of the European Union gathers within a single document the whole area of civil, political, economic and social rights. [11, 72-73] Within the Charter, that respects the competence and duties of the European Union and also the principle of subsidiarity, there have been recognized, reaffirmed and developed fundamental judicial norms regarding human rights, the right that especially results from the common constitutional traditions and international obligations of the member states, from the European Convention regarding the protection of human rights and fundamental liberties, from the social charters adopted by the Union as well as from the jurisprudence of the Judicial Court of the European Union and the European Court for Human Rights.

Discrimination of any kind, based on reasons such as gender, race, color, ethnic or social origin, genetic features, language, religion or political opinion or any other kind of opinion, membership to a national minority, wealth, birth, disability, age or sexual orientation is forbidden. [12, art.21, paragraph (1)]

The Charter of the fundamental rights of the European Union provides that every employee has the right to labor conditions that respect their health, security, and dignity. [12, art.31, paragraph (1)]

The Universal Declaration of Human Rights, adopted on 10th of December 1948 and the Convention of the United Nations regarding the elimination of all forms of discrimination regard the right to equality before the law and protection against discrimination as being universal rights.

The principle of equality of treatment between men and women regarding the access to employment, professional training and promotion and labor conditions is consecrated on an European level by Directive 76/207/CEE regarding the application of the principle of equality of treatment between men and women regarding the access to employment, professional training and promotion, as well as labor conditions and the internal legislation plan, by Government Ordinance no. 137/2000 and Law 202/2002 [4], is an application of the more general principle of non-discrimination within work relations.

Directive 89/391/CEE of 12th of January 1989 regarding the introduction of measures for promoting the improvement of the security and health of employees at the workplace, ensures the minimum requirements in what regards security and health at the workplace throughout Europe and gives the employers the responsibility to prevent injuries of any type, including the ones resulting from moral harassment. According to the provisions of this normative act, for diminishing or reducing the risk of psychological harassment, employers must prevent moral harassment, must evaluate the risk of being morally harassed and must take appropriate measures in order to prevent this phenomenon and its consequences.

Directive 2000/43/CE of June 29th 2000 regards the implementation of equality of chance of people regardless of their ethnicity or race and states that the member states are obliged to enforce within their national judicial systems the necessary measures for people protection towards any unfavorable treatment or towards any means that affects them as a reaction to a complaint or procedure that is meant to impose the keeping of the principle of equality of treatment. The principle of equality of treatment is taken into account throughout the member states of the European Union.

Directive 2000/78/CE of 27th of November 2000 establishes the directive measures regarding equality of treatment during employment and throughout the profession, stating that the member states have the obligation to take the appropriate measures to favor dialogue between social partners in order to promote equality of treatment, including the supervision of the practices present at the workplace, by collective conventions, conduct codes and research or exchange of experience or good practices.

The European Parliament has also adopted a motion for a resolution regarding moral harassment at the workplace that invites the member states, in order to counter moral and sexual harassment at the workplace, to examine and, if appropriate, to complete the existent legislation, to reinitialize and standardize the definition of moral harassment. [13, art.33, paragraph (1)]

The Council Directive 2004/113/CEE has the purpose to form a frame for combating sex discrimination in what regards the access to goods and services by applying the principle of equality of treatment between men and women. The principle of

equality of treatment between men and women states that there cannot be any direct discrimination based on gender including the less favorable treatment of women on reasons of pregnancy and maternity and that there cannot be any indirect sexual discrimination either. [14, art.4, paragraph 1]

Recruitment based on physical aspect, height or marital status, requiring sexual relations in exchange for an employment promise, requiring an agreement regarding the current and future pregnancy status, promotion, masculinizing certain fields such as IT, different salaries for the same qualification and experience, exhibiting a male reference standard, placing "obstacles" after returning from maternity leave such as: returning for another post, transfer in another location or city are just a few of the discriminatory situations confirmed by women throughout time.

This discrimination can also be harmful because it is an obstacle for the total integration of men and women in social and economic life. As is the case for the other mentioned Directives, the objective can better be achieved through community legislation.

Within the national legislation, legal contraventions for not keeping the principle of equality of treatment within work relations are mentioned in the provisions of the Government Ordinance no. 137/2000 regarding the prevention and punishment of all discrimination forms, thusly the Romanian legislator has created by art. 19 a national authority that investigates and punishes the discriminatory acts or deeds provided by the Ordinance, namely the National Council for Combating Discrimination.

The right to an equitable trial, provided by art. 6, paragraph 1 of the European Convention of Human Rights, states that every person has the right to be publicly judged within a reasonable term for his cause by an independent court that is partially instituted by law, that will make a decision regarding the violation of his rights and liberties, having a civil character, or over the truthfulness of any legal accusation brought against that person.

In order to solve possible litigations, the law firstly provides the possibility for employees to submit notifications, requests or complaints towards their employer or against them, if they are directly involved, and to request the aid of union representatives in order to solve the conflict at the workplace.

It is possible that harassment acts and the acts of instigation to violence, besides the fact that they represent discrimination, are under the incidence of the national criminal law, especially when they are related to race or ethnicity.

MOBBING

Another type of discrimination within work relations, a phenomenon that is frequent and is gaining momentum in this century, is mobbing, a form of psychological harassment in the workplace, also named psychological terror. According to the one who created and impose the mobbing term within work environments and organization, defines a destructive process; it is constituted by hostile actions which, if isolated, can appear harmless but through constant repetition have dangerous effects. [15,26-27]

Psychological aggression toward people can affect their health and can even have social and psychological consequences.

During the eighties, professor Heinz Leymann introduces the mobbing concept within the organizational environment, separating it from bullying, a term which is sometimes used as a synonym by certain authors. By his understanding, bullying is mainly physical aggression and threatening whereas with mobbing the aggressiveness is most times subtle, occurring by social manipulation, its existence being potentially observed late. What made this pedagogic specialist and doctor in psychiatry particularly interested in this phenomenon were the results of a medical research that concluded that sometimes there is such powerful psychological stress at the workplace that they induce serious physical and psychological illness.

Studies in this field, many of them conducted or done by Leymann himself, have demonstrated that mobbing is a psychological phenomenon that occurs throughout the whole world, especially but now only within large organizations.

Although easier to notice at the workplace, this type of aggression has been also seen in informal groups (eg. teenager gangs). The name of the phenomenon has been thusly chosen so as to make a clear distinction between this and a conflict of another type namely the compulsory implication of a group.

The mobbing term has two meanings for the scientific community, a moderate and a radical one, according to the effects that they have on the target individuals. The moderate understanding of mobbing refers to warning mobbing (of low intensity and

lasting until the victim "understands" to abide by the values and conduct adopted by the group). The radical meaning regards the proper mobbing, seen as "psycho-terror at the workplace" or, according to some researchers, "psychological torture at the workplace".

Legislative measures for preventing and countering mobbing

Studies made on this subject have brought into the attention of the European institutions the stress factor at the workplace, in all its forms, as a highly damaging factor for the staff. The norms issued on this subject refer to psychological harassment as "moral harassment" and establish directive measures for ensuring the minimal requirements for labor security. They do not imply any restriction exercised by community organs of the states in any way that means the adoption of a certain set of laws. The Member States have the liberty to choose the implementation method and also can have harsher norms than the ones present in community documents.

Of the European Documents that refer to work relations, the psychological climate and moral harassment the most important are:

- The Charter of the fundamental rights of the European Union that states in art. 31 that „every employee has the right to labor conditions that respect their health, security, and dignity“.
- Directive 89/391/CEE of 12th of January 1989 regarding labor security and health ensures the minimum requirements in what regards labor health and security throughout Europe and gives the employers the responsibility to prevent any type of harm, including the one resulting from moral harassment. According to the provisions of this normative act, to diminish or reduce the risk of psychological harassment employers must have the objective to prevent moral harassment, to evaluate the risk of being morally harassed, to take appropriate measures to prevent this phenomenon and its consequences.
- Directive 2000/43/EC regards the implementation of equality of chance of people regardless of their ethnicity or race and states that the member states have the obligation to include in their national judicial systems necessary measures to protect people of any treatment that is not favorable to them or of any means by which they are affected, as a reaction to a complaint or a procedure that is meant to impose the keeping of the principle of equality of treatment (art.9)

- Directive 2000/78/EC establishes through art. 13 paragraph (1) the directive measures regarding equality of treatment upon employment and during profession: the member states take appropriate measures in order to favor the dialogue between social partners in order to promote equality of treatment, including by supervising the practices at the workplace, through collective conventions, conduct codes and research or experience and good practice exchange.

The European Parliament has also adopted a motion for a resolution regarding moral harassment at the workplace by which it invites the member states, with the purpose of countering moral and sexual harassment at the workplace, to examine and, if appropriate, to complete the existence legislation, to reanalyze and standardize the definition of moral harassment.

Adopting a special law, in what regards moral harassment at the workplace, has different standards throughout the member states of the European Union. While some states have already initialized regulatory actions by adopting normative acts (statutes, guides, resolutions), in other states the issue is still being studied. Taking the terminology of the directives above, most states that already have their own regulations for combating mobbing refer to it as "moral harassment" and only a very small number have included the mobbing term in their legislative documents.

Of the community states, France, Belgium, the Netherlands, Denmark, Finland, and Sweden have thought necessary to adopt a specific legislation. Other member states such as Italy, Spain, Germany, Great Britain, and Ireland have decided that the current legislation has provisions regarding the prevention and punishment of mobbing and that specific laws are not necessary.

In Romania, the institutional frame on the problematic of politics of prevention and combat of discrimination forms has developed through:

- G.O. no. 137/2000 regarding the prevention and punishment of all discrimination forms that offers general landmarks of public politics in this domain; this ordinance has been adopted in order to prevent and punish all forms of discrimination including the ones regarding work relations and union right. [3,232]
- H.G. no. 1194/2001 by which the National Council for Combating Discrimination was founded having specific attributions regarding the prevention of discrimination,

mediation of parts in case of discrimination, investigating, establishing and punishing discrimination, monitoring discrimination cases, special assistance to discrimination victims.

- Law no. 202/2002 regarding equality of chance and treatment between men and women. With specific attributions for implementing legal provisions, it is founded by the National Agency for Equality of Chance between Men and Women.
- G.O. no. 84/2004 for the modification and completion of Law no. 202/2002 adopted in the second half of 2004 through which Directive 2002/73/EC of amending Directive 76/207/EEC was wholly transposed regarding the application of the principle of equality of treatment between men and women referring to access to employment, professional training, promotion, as well as labor conditions.

However, a specific legislation regarding the mobbing phenomenon is nonexistent but only indirect mentions and incipient elements addressed by public politics. The Labor Code (art. 5 and 171) has specifications that can also include in their interpretation the managing of mobbing phenomena.

In some private organizations, especially multinationals, there are redacted an implemented codes of good practice within work relations that also include elements of preventing and combating mobbing.

In order to be supported during these situations, one must appeal to the National Council for Combating Discrimination and to an Anti-Mobbing Center.

In conclusion, there must be emphasized that the most important, fundamental and essential objective of every democratic society is a society where all people are equal, have equal chances, have the same opportunities, the same rights and duties within different domains of the social life, all the more that international security itself is connected to the keeping of the fundamental human rights and liberties.

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