Jus et Civitas	Vol. IX (LXXIII) No. 1/2022	56 - 64	A Journal of Social and Legal Studies

Legitimate differential treatment in labor relations

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DOI: 10.51865/JETC.2022.1.08

Abstract

The substantiation of the concept of non-discrimination was initially made in relation to the recognition of the principle of equality, being established certain criteria that constituted a hard core of the regulations necessary to achieve protection. The national states have regulated in this matter by establishing in national legislation specific rules, initially found at the constitutional level, in the legal labor relations determining equal access to the labor supply. Subsequently, under the influence of interpretations of case law, the rules of non-discrimination were found at the level of organic laws, as a way for national courts to respond to solutions issued by European courts.

Keywords: discrimination; criteria; justification; dignity; work

Introduction

In assessing the concept, discrimination takes into account acts or facts[1] which result in situations of difference, exclusion, restriction or preference of the rights or freedoms of persons in comparable situations. In legal employment relationships, these illegal conducts are based on the non-recognition of protected criteria contained in legal norms and principles[2] of work.

Discriminatory conduct means a difference of appreciation applied to a person, ie unfavorable treatment, compared to one applied to another person with similar duties at work, this concept having an applicability in multiple spheres of citizens' lives[3].

[1] Magnus Carlsson, Dan-Olof Rooth, *Evidence of ethnic discrimination in the Swedish labor market using experimental data*, Labour Economics, Volume 14, Issue 4, 2007, pg. 716.

[2] Onica-Chipea Lavinia, *Dreptul muncii. Curs universitar. Editia a II-a revazuta si adaugita,* Editura Pro Universitaria, București, 2013, pg.32.

[3] Marinescu, Delia-Mihaela, *The evolution of the concepts of equal opportunities and migration in the legislation of the European Union*, articol publicat în Proceeding ale Conferinţei Stintifice Internaţionale „ Global Security and National Defence", pp.490-494, Universitatea Naţională de Apărare „Carol I", Doctoral School, 25-26 iunie 2020, ISSN: 2668- 2281, ISSN-L 2668-2281.

Exceptions are the existence of a case of objective justification of the conduct of the employer, reasonable and objective where it does not replace an arbitrary practice[4].

On the other hand, discrimination presupposes the existence of unlawful conduct involving persons in different situations treated indiscriminately, with ECJ Case C-106/83 extending the application of the concept beyond the presence of a comparable situation.

In the first case, the burden of proof of discrimination requires proof of a comparable situation in the field of the occurrence of the unlawful act, including studies[5] statistics. Thus, in the case of the discriminatory application of a different standard of remuneration, the existence of similar attributions from the job description is followed, but also the indication of the person in a situation comparable to the victim.

From the point of view of protected criteria, national legislation indefinitely regulates race, nationality, ethnicity, language, religion, social status, beliefs, sex, sexual orientation, age, disability, chronic non-communicable disease, HIV infection, membership in a category disadvantaged, but not limited, with the possibility of including any other such elements of differential treatment.

Forms of discrimination

In terms of cases of indirect discrimination, the author's seemingly neutral practices are taken into account, but based on the protected criteria provided by law, when there is an intention to discriminate. The intention involves the creation of effects of restriction, removal of the recognition, use or exercise of the fundamental rights and freedoms of the victim, for example in legal employment relationships. The author seeks the non-recognition of the protected criteria specified in the regulatory norm, the application of illegal conduct to an employee, as well as the purpose of the occurrence of a legal inequality[6] in the employment relationship.

On the other hand, the categories on which it is planned to abolish the recognition of rights affect the sexual, ethnic, racial, religious, social, political, cultural spheres, the forms of discrimination being provided in the international, European or national legislation.

In this context, direct discrimination means the application of unequal and unfavorable treatment, based on the protected criteria imposed by law, targeting a particular person, for the purpose of not granting, restricting or removing the recognition, use or exercise of his rights. In practice, direct discrimination concerns the conduct of the author objectively linked to the protected criteria, which implies the direct intention and the presence of a situation of exclusion, difference, restriction or preference, between comparable employees as attributions.

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[4] Renucci, J.F., *Tratat de drept european al drepturilor omului*, Ed. Hamangiu, București, 2009, pg.153.

[5] Drydakis, Nick, Minas, Vlassis, *Etnic discrimination in the greek labour market: occupational acces, insurance and coverage and wage offers*, The Manchester School, Volume 78, Issue 3, 2010, pg.201.

[6] Ștefănescu, Ion Traian, *Tratat teoretic și practic de drept al muncii*, Universul Juridic, București, 2014, pg. 83.

Indirect discrimination means the pursuit by the author of a purpose similar to that of direct discrimination, but simulating the appearance of legality. In both forms, illegal acts or deeds can target a single person, but also groups of people.

The regulation defining the form of direct discrimination can be found in Council Directive 2002/73 / EC amending Council Directive 76/207 / EEC on the application of the principle of equal treatment between men and women as regards access to employment, training and promotion. professional and working conditions, respectively the situation of applying a less favorable treatment, compared to another person in a comparable situation.

The Directive establishes as the basis for direct discrimination the production of any act of distinction, exclusion, restriction or preference, based on race, nationality, ethnicity, language, religion, social category, beliefs, sex, sexual orientation, age, disability, chronic non-communicable disease, HIV infection or belonging to a disadvantaged category.

In the national system, the criteria of direct discrimination are not restrictive, compared to European legislation, regardless of whether the differential treatment concerns any criteria other than those imperatively contained. The general condition is that the purpose or effect of the unlawful conduct is related to the restriction or removal of the recognition, use or exercise of the fundamental rights and freedoms of the victim, as well as the violation of the principle of equality.

On the other hand, indirect discrimination is provided for in Council Directive 2002/73/EC, as the situation where a neutral provision, criterion or practice, apparently unrelated to a certain discrimination criterion expressly indicated in law, creates an effect similar to discrimination. direct, by putting some people at a disadvantage compared to others.

In this case, the essential condition for the existence of discrimination is linked to the requirement that the provision, criterion or practice not be objectively justified by a legitimate aim, where the possibilities of achieving it are necessary.

On the other hand, indirect discrimination is an active or passive form of behavior, applied to persons in comparable situations, which has the effect of favoring, unjustified disfavoring, and subjecting to unfair or degrading treatment of that person, a group or of a community. For example, we can appreciate, in the sense of interpreting indirect discrimination through Law no. 340/2006 on equal opportunities between women and men, that it is forbidden to apply in order to hire a candidate to present a pregnancy test, to sign a commitment that she will not become pregnant or undertake not to give birth during the term of the individual employment contract, provided that maternity cannot constitute grounds for discrimination against women.

In the doctrine, direct discrimination is interpreted as unfavorable treatment directed against a certain person, the inequality aiming at the protected criteria, and the indirect one will refer to an unfavorable treatment applied to a group of persons. Last but not least, discrimination in some states was perceived as an attitude of collective ignorance.

Regarding the ancillary forms of direct discrimination [7] or indirectly, the relevant regulations recognize harassment [8] and sexual harassment, in the application of mainly discrimination criteria based on sexual inequality.

In these circumstances, we can appreciate that any action that has the effect of causing cases of differentiation, exclusion or restriction based on sex, in order to limit equality between men and women, and against the exercise by women of human rights and fundamental freedoms regardless of their marital status constitutes sexual harassment, with relevance in the political, economic, social, cultural, civil or any other relevant fields.

Thus, in legal employment relationships, sexual harassment is based on an unwanted form of behavior at work, respectively on the occurrence of illegal and illegal conduct of a physical or non-verbal nature. These imply a sexual connotation and lead to illegal effects that affect the dignity of employees, women or men. In terms of production methods, sexual harassment means soliciting sexual favors, but also communicating indecent remarks or committing gestures with sexual connotations. The person covered by these documents must not admit them, which will force the employer to make legal decisions in this matter.

In practice, the limitation of sexual harassment in the workplace involves the introduction in internal regulations by employers of specific disciplinary sanctions applicable to perpetrators of discrimination, as well as the obligation to inform employees about the prohibition of these categories of harassment, under penalty of enforcement. related to the resolution of complaints regarding inequality[9] for treatment.

As regards the concept of positive discrimination, it is based on actions which, although contrary to the principle of equal treatment of persons, aim to protect the interests of a certain category of persons or a group at a disadvantage compared to most of them. The introduction of favorable legal measures thus determines the protection of categories considered disadvantaged, through additional measures and benefits, but while maintaining an equal degree of access to rights and freedoms[10], for the purpose of non-discrimination.

Of course, these concepts were developed through European directives, in particular Directive no.1999/70/CE[11], no.2000/43/CE[12], no.2000/78/CE[13], as well as no.2004/113/CE[14], enacted in accordance with the provisions of the European Treaties and subsequently transposed into national legal systems.

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[7] Muscalu, Loredana Manuela, *Discriminarea în relațiile de muncă*, Editura Hamangiu, București, 2015, pg.17.

[8] Sâmboan, Cristina, *Demnitatea în muncă*, Editura C.H. Beck, București, 2017, pg. 282.

[9] Preduț Marius-Catalin, *Codul muncii - comentat*, Editura Universul Juridic, București, 2016, pg. 33.

[10] Roș, Nicolae, *Dreptul muncii. Curs universitar*, Editura Pro Universitaria, București, 2017, pg.37

[11] Directive 1999/70 / EC on the framework agreement on fixed-term work.

[12] Directive No 2000/43 / EC on racial equality.

[13] Directive 2000/78 / EC on equal treatment in employment.

[14] Directive no. 2004/113 / EC on the implementation of the principle of equal treatment between men and women.

In the national legislation, non-discrimination is imposed starting with the constitutional provisions found in the provisions of articles 16 paragraphs 1 and 41 paragraphs 1 of the Romanian Constitution, the provisions of articles 5, 6, 159 of the Labor Code and the provisions O.U.G.no. 137/2000[15], as well as Legea nr. 202/2002[16], the principle of equal treatment in labor relations imposing itself as a priority of the legislator.

Objective justification

We can appreciate that the jurisprudence of the CJEU on the interpretation of the modalities contained in the directives has become an essential component for the issuance of solutions in the national courts of the Member States. This applies in particular to issues related to discrimination by association, disability, differential treatment on grounds of age, discrimination on grounds of racial origin, ethnicity, religion and belief, but also on the influence of the EU Charter of Fundamental Rights in the mechanism. interpretation.

With regard to discrimination on grounds of age or disability, differential treatment is considered legitimate in so far as it is relevant in the case, being motivated by objective evidence, generally related to the existence of reasons relating to the public interest. In this respect, we can take into account the requirements regarding the minimum age required for access to legal employment relationships or for the provision of facilities.

In this respect, the use of seemingly neutral rules may implicitly lead to the production of effects considered prejudicial in the application of non-discrimination rules, but accepted as reasonable in achieving a legitimate aim.

With regard to disability, protection against discrimination will relate to the rules contained in the domestic law of States, based on the provisions of the United Nations Convention on the Rights of Persons with Disabilities.

The transposition of non-discrimination provisions into the national legislation of the Member States, in the case of discrimination on grounds of age in legal employment relationships, shall be carried out in accordance with the provisions of Article 6 (1) of Directive 2000/78/EC.

In this regard, following the Commission's assessment in 2012 and the Report of the European Network of Non-Discrimination Legal Experts on Age and Employment[17], we consider analyzing the distinction between certain cases of discrimination and the application of justified differences in treatment, when the means to achieve this goal are necessary and proportionate, for example targeting the needs of employees, but also professional skills at different ages. In practice, the justified differentiation includes the purpose of achieving the protection of those age groups considered vulnerable.

In the same vein, AGE Platform Europe found that Directive 2000/78 / EC led to a change in the mentality of employers who became more interested in the subject of age discrimination, given that a significant number of employees wanted to continue working and beyond reaching retirement age. This concept has led to changes in the

[15] O.U.G.nr. 137/2000 on the prevention and sanctioning of all forms of discrimination.

[16] Law no. 202/2002 on equal opportunities and treatment between women and men.

[17]Declan O'Dempsey and Anna Beale, European Network of Non-Discrimination Experts, http://ec.europa.eu/justice/discrimination/files/age_and_employment_en.pdf.

social policy of states, but also to change the methods of recruitment by eliminating the conditions related to a certain age of employment[18], allowing the prolongation of the professional life of the employees.

However, there are exceptions under Article 6 (1) (a) of Directive 2000/78 / EC, with certain Member States introducing rules for young people. Thus, Hungary and Finland stimulate young jobseekers, Bulgaria, Estonia and Romania have introduced rules containing financial incentives for employers, and Lithuania has involved protection rules. On the other hand, Belgium and Italy have tried to stimulate the labor market by introducing exceptions to the anti-discrimination rules, given that other states have lowered their barriers or allowed lower wages.

With regard to the exceptions contained in Article 6 (2) of Directive 2000/78 / EC against discrimination on grounds of age in occupational social security systems, 21 Member States have provided for general exemption clauses[19], and 8 of them state that age is an essential criterion [20]. France, Lithuania, Malta, Portugal and Slovenia have not introduced exemption clauses, given that not all Member States have information to that effect[21].

The protection granted to older employees was represented by the granting of financial incentives for employers in Estonia, Romania and Italy, the admission of additional leave in Belgium or Denmark, as well as provisions regarding dismissals in Hungary.

As a result, the cumulated provisions of the Directive are applicable to young employees no.94/33/CE[22], as well as the provisions of the Directive no.2000/78/CE, supplemented by the special internal rules on the subject maintained or introduced by the Member States into national law.

Thus, supporting the integration of young people into legal employment in Belgium has made it possible to grant a lower salary in the case of 15- to 18-year-olds in Bulgaria, to reimburse employees' salary costs in the first year of employment of employees under the age of 29. , and in Denmark the possibility of concluding collective agreements between the social partners related to the remuneration system for workers under the age of 18, the absence of which also implies the non-application of non-discrimination rules for persons under 15.

In the case of Spain, measures have been introduced for part-time indefinite employment contracts for people under 25, including vocational training, in Ireland training programs for young people leaving school early, and in Italy financial incentives and legal exceptions. in the case of employers recruiting unemployed young people aged between 18 and 29 for at least 6 months, sometimes the lack of positive

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[18] Age and employment report, www.age-platform.eu
[19] Belgium, Bulgaria, Czech Republic, Denmark, Spain, Poland, Romania, Finland, Great Britain.
[20] Belgium, Denmark, Cyprus, the Netherlands.
[21] Belgium, Czech Republic, Denmark, Hungary, Cyprus, Netherlands, Romania, U. K., Spain.
[22] Council Directive 94/33 / EC of 22 June 1994 on the protection of the health and safety of young people at work as regards, in essence, working time, rest periods and night work.

measures being replaced by a mechanism to reduce wages in these categories in order to stimulate employment.

In Lithuania there is no probationary period for young people under the age of 18, in Hungary they receive an additional 5 days leave and free training for disadvantaged people under 25, and in Slovakia the special conditions concern employment, remuneration and dismissal of those under 18, including the employer's obligation to impose a work environment necessary for professional development.

A program has been introduced in Romania to financially stimulate young graduates and the unemployed, in Finland special rules aimed at guaranteeing those under 25 and recent graduates up to the age of 30 access to jobs, and in the UK mechanisms specific remuneration for employees under the age of 21 who will benefit from a minimum wage in an amount higher than those over this age.

In the case of older workers, Belgium stimulates their recruitment by providing subsidies to employers for pay, but also through the mechanism to reduce the working hours for those over 55, Bulgaria subsidizes the salary for the first year of activity for those over 50 years, and Germany grants additional leave in the public sector for those over 55 years of age.

In Estonia, additional leave is granted, in Spain incentives have been introduced in the fields of training and employment by subsidizing remuneration, and in France the possibility of imposing sanctions in the event of non-establishment of minimum quotas for employees over 50 in collective agreements. for years.

In Croatia, the granting of special privileges to older employees does not constitute discrimination, in Italy financial incentives are provided for a 50% reduction in social security contributions for employers recruiting persons over 50 years of age or unemployed for at least 12 months, and in Hungary financial incentives for those over 50 and restrictions on dismissing employees who are 5 years old until they reach retirement age.

In Malta we find the financial incentives granted to employers in case of recruitment and training of people over 40 and unemployed, in Romania fiscal incentives recruitment of unemployed over 45 years, and in Slovenia part-time work and lack of obligation to perform activities on night time for workers over 55 years of age.

Conclusion

We can appreciate that non-discrimination did not only refer to the principle of humanity in the relations between the parties, being extended also in terms of the recognition of freedoms such as conscience. Thus, the limitation only to respect for the dignity of workers became inappropriate, given that the application of the principle of equality allowed for a much more pertinent analysis.

On the other hand, limiting discrimination in employment only to the negative side of equality was not sufficient, given that this principle required general application. In this sense, the introduction of non-discrimination criteria meant not only the identification of comparable situations, but also similar ones, as well as allowing the regulation of some exceptions.

This way of extending the rules for assessing the existence of discrimination, allowed conclusive solutions resulting from court interpretations, which were able to analyze more than a direct illegal act of employers, but also evidence of a presumption of illegal conduct so qualified. by purpose.

Of course, non-discrimination involves the recognition of protected criteria, which, although apparently easy to impose, has been a different element at the level of national states. In this respect, the criterion of race was not uniformly accepted, given that France did not allow the definition of race, for historical reasons. It sought to eliminate those statistics on the highlighting of ethnic structures within society that would have given rise to a process of ethnicization and the emergence of tendencies to reject these populations.

In the same vein, as regards the criterion of nationality, it meant reporting on rights of residence, which does not imply non-discrimination, the effect being linked to a limited application of the provisions of Article 14 of the ECHR. Thus, citizenship becomes similar to nationality, a limiting aspect regarding equal access to employment for all persons in a given state.

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Tratamentul diferențiat legitim în raporturile de muncă

Rezumat

Fundamentarea conceptului de nediscriminare s-a realizat inițial cu raportare la recunoașterea principiului egalității, find instituite anumite criterii care au constituit un nucleu dur al reglementărilor necesare realizării protecției. Statele naționale au reglementat în materie instituind în cadrul legislațiilor naționale a unor norme specific, regăsite inițial la nivel constituțional, în cadrul raporturilor juridice de muncă determinând accesul egal la oferta de muncă. Ulterior, sub influența interpretărilor jurisprudenței, normele de nediscriminare s-au regăsit la nivelul legilor organice, ca o modalitate de răspuns a instanțelor naționale la soluțiile emise de instanțele europene.