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EFFECTIVENESS OF LEGAL INSTRUMENTS OF LIMITING DISCRIMINATION IN EMPLOYMENT

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Abstract:
Unequal treatment in employment is an important issue for both employers and employees. Because of the negative social consequences of this phenomenon, it is important to recognize legal measures to counteract discrimination and to evaluate their effectiveness. The article presents an in-depth analysis of legal regulations in Poland and the European Union and anti-discrimination practices in organizations. Author evaluate according to available statistical data the effectiveness of legal protection for equal treatment of employees. The conducted analysis revealed the opportunities of reduction the negative effects of this phenomenon. The article identified main directions for improvement of instruments to prevent discrimination in employment.

Keywords: equal treatment in employment, efficiency, discrimination, labour law, employment law

1. INTRODUCTION

Discrimination is an extremely broad term. It applies to all forms of unequal treatment of people due to various factors such as gender, religion, race etc. Manifestations of this kind of behaviour are now being very well publicised and all such cases are sharply opposed.

One of the most significant problems for enterprises is unequal treatment in employment. It is a very serious problem of the modern economy due to both the social costs of discriminatory actions, and the impact of such practices on business enterprises themselves.

Discriminatory behaviour towards employees, as well as towards potential employees is handled with particular attention by the authorities of the European Union and the individual member states. People affected by discriminatory actions in an employment relationship have received additional legal instruments which allow better protection of their interests against the stronger party which is the employer.

However, as seen in practice, i.e. in the actions actually taken by employers, in a situation of potential discriminatory actions and faced with the number of cases pending before common courts, these instruments still appear to be inadequate.

Statistics on the number of cases of discrimination against employees might indicate a growing number of such practices, but in fact, the growing trend is associated more with the greater awareness of employees than the actual escalation of this phenomenon.

It is not possible to conduct a fully objective study of the phenomenon of discrimination in companies, because, on the one hand, even anonymous surveys would strike at the good name of the company and also would risk criminal responsibility for employers violating the rights of their employees. In the light of this, the employers' objections to this kind of research are understandable.

At the same time, as based on practice, the awareness of the obligations of the employer concerning e.g. an anti-discrimination policy is quite superficial and often limited to the formal preparation of documents and procedures of conduct. On the other hand, the employees themselves, despite being aware of their rights, are afraid of the possible negative consequences of reporting cases of discrimination against themselves.

2. INSTRUMENTS FOR THE LEGAL PROTECTION OF PEOPLE DISCRIMINATED AGAINST IN EMPLOYMENT

2.1. European Union regulations

Regulations concerning discrimination and equal treatment were formulated even before the establishment of the European Union. The basis was and still is the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950. It was signed by the Member States of the Council of Europe. These rights are broadly applied and interpreted by the extensive case law of the European Court of Human Rights.

However, from the point of view of the manifestations of unequal treatment in employment, the most important is European Union Council Directive 2000/78/EC of 27 November 2000 which established the general framework for equal treatment in employment and occupation.

The Directive introduced the principle of equal treatment as the absence of any form of direct or indirect discrimination based on religion or belief, disability, age or sexual orientation as regards to employment or work. It is distinctive and somewhat narrow that the Directive indicates only these criteria. Particularly incomprehensible is the absence of e.g. the criterion of ethnic origin and race. The prohibition of this kind of discrimination, however, is laid down in other regulations of the European Union. The problem would also be to collect and analyse data for ethnic and racial discrimination as it is generally prohibited to collect this kind of data.

The Directive indicates that direct discrimination takes place when a person is treated less favourably than another is, or would be, treated in a comparable situation, on any of the grounds referred to above. This means that direct discrimination occurs in the event of such a fact occurring to a specific person.

Indirect discrimination occurs when a provision, criterion or apparently neutral practice could lead to a particular disadvantage compared to other people for persons of a particular religion or belief, disability, age or sexual orientation. This means that it is not necessary for any person to suffer harm and only a hypothetical possibility of discrimination is sufficient to speak about this kind of discrimination. This allows the prevention of discriminatory practices at an early stage of establishing the law or procedures.

The Directive provides a number of derogations from the application of these principles, e.g. in cases of age or disability in some types of professional activity. However, presenting such regulations at length would be irrelevant to the issues included in the present study.

The regulations that help protect the rights of people discriminated against are extremely important. The Directive requires member states to ensure the participation of associations and organisations protecting the rights of people discriminated against in terms of the initiation and participation in judicial and administrative proceedings in connection with the violation of the principle of equal treatment. In addition, an important requirement is the burden of proof, which rests on the defendant, i.e. the employer. The employee must only present facts indicating the possibility of direct or indirect discrimination. The employer must prove that the actions undertaken by him or her are not discriminatory but are objectively justified. It should be noted that this is a key rule allowing the actual exercise of the rights of employees due to the fact that the employer is the stronger party and its position in proceedings would also be stronger, as discussed below. Another important rule is the requirement for member states to protect persons initiating proceedings aimed at bringing employers into compliance with the principle of equal treatment against victimisation by employers. In practice, this refers mainly to dismissal, changes in working conditions and the imposition of disciplinary penalties.

The implementation of these regulations was to be completed by 2 December 2003. Every 5 years, member countries are required to provide the Commission with information to enable it to prepare a report on the application of the Directive.

2.2. Regulations as in the example of Poland

The right to non-discriminatory treatment is based on Article 32 paragraph. 2 of the Polish Constitution, which establishes the general prohibition of discrimination in political, social and economic life for any reason whatsoever. This indicates the great importance that the Polish legal system attaches to the equal treatment of citizens.

In Poland, the recommendations of the Council Directive 2000/78/EC were introduced into the Labour Code Act of 14 November 2003. These regulations met with objections from the European Commission of the improper performance of the obligations by the Republic of Poland, due to the limitation on implementing equality directives, i.e. 2000/43/EC, 2000/78/EC and 2006/54/EC, only to the group of people employed on the basis of employment contracts. (Ed. Baran) This is due to the fact that placing these regulations specifically in the Labour Code and the manner in which the regulations are expressed resulted in the exclusion of a large part of discriminatory behaviour of employers towards people who, because of discrimination, did not become employees under the Labour Code, or also as a result of such actions, perform duties under civil-law contracts. This was partially corrected by the regulation of 3 December 2010 on the implementation of certain provisions of the European Union in the field of equal treatment. Here, however, it became apparent that there was a need for a clear definition of the rights of people discriminated against. The Act refers in fact to the regulations of the Civil Code and the Code of Civil Procedure, and it is unclear on what basis the defendant is brought to trial, i.e. on the basis of guilt, risk or equity. Moreover, the procedure is longer and more expensive than in the case of claims by discriminated-against employees pursuing their claims under the Labour Code. It is also extremely difficult to monitor and evaluate the number of such cases.

Even if there are problems with the subjective scope of the anti-discrimination regulations in employment, the Polish regulations cover a wider range of bases for regarding such behaviour as discriminatory. As mentioned above, Directive 2000/78/EC restricts discriminatory behaviour in employment to religion, belief, disability, age and sexual orientation. The Polish regulations specify, in particular, gender, age, disability, race, religion, nationality, political opinion, trade-union membership, ethnic origin, religion, sexual orientation, and employment for a definite or indefinite period or full or part-time work. What is important is that it is not a closed list, so discrimination can be recognised in relation to e.g. appearance, obesity etc. It clearly facilitates asserting claims in discrimination cases and allows a flexible approach to this phenomenon in situations where social, technological and civilisational changes often cause the obsolescence of existing legislation.

Art. 18^{3d} of the Labour Code indicates that a person against whom the employer has violated the principle of equal treatment in employment is entitled to compensation in an amount not less than the minimum salary. This is not required by the regulations of the European Union. It greatly facilitates asserting claims by people discriminated against, because the general rule is that compensation is granted for the damage incurred. In such situations there is usually no damage or it is present in a small amount. It is also very difficult for the employee to prove how much damage has occurred. In such a case there would be no actual sanctions for discriminatory actions. An interesting opinion was expressed by the Supreme Court in its judgment of 7 January 2009, ref. III PK 43/08, which noted that the amount of compensation should also have a deterrent effect. It clearly states “the compensation laid down in Article. 18^{3d} of the Labour Code must be effective, proportionate and dissuasive. The compensation should therefore compensate for damage incurred by the employee, should reflect the appropriate balance between compensation and violation of the employer's obligation of the equal treatment of workers, and should act preventively. Determining its amount must therefore take into account the circumstances on both sides of the employment relationship, especially for damages intended to compensate for the employee’s moral damages, which - according to the nomenclature adopted in Poland – involves reparation for harm." (LEX No. 577695) It follows from the above that the compensation is a means of "punishment" to the employer. Moreover, this claim can be combined with other labour claims, e.g. due to the unjustified termination of employment.

Polish law also expanded the catalogue of protection against victimisation compared to the recommendations of Directive 2000/78/EC. Art. 18^{3e} of the Labour Code prohibits not only the unfavourable treatment of the employee and any negative consequences on the employee who has exercised his/her powers, but in the same way also protects an employee who has given any form of support to such an employee.

The additional regulations concerning mobbing should also be mentioned. The European Union has not yet adopted any regulations on mobbing. This issue has only been regulated in a few European countries, of which Poland is one. The concept and scope of mobbing are quite vague and difficult to distinguish from discrimination. (Jaśkowski K., E. Maniewska) Substantial modifications to these terms should be made as a result of difficulties in interpretation not only by employees but also by specialists in this field. Mobbing is defined in art. 943§2 of the Labour Code and means any action or behaviour relating to an employee or directed against an employee involving the persistent and prolonged harassment or intimidation, causing him/her to have a low opinion of his/her professional competence, causing or intending to cause the humiliation or ridiculing of the employee, or isolating him/her or eliminating him/her from colleagues. An additional instrument for the protection of workers subjected to mobbing is compensation of not less than the minimum salary if, as a result of the mobbing, the employee terminates his/her contract of employment, and it stipulates monetary compensation for harm if the employee suffers a health disorder.

3. EVALUATION OF THE EFFECTIVENESS OF ANTI-DISCRIMINATION REGULATIONS

3.1. The implementation of European Union regulations

According to the previously indicated provisions, the European Commission a report is being prepared on the application of the Directive on the basis of data provided by Member States in five-year periods. The last report was prepared on 17 January 2014 and points to problems with the implementation of

anti-discrimination laws in employment. (Joint Report on the application of Council Directive 2000/43 / EC).

The main conclusion of this report is that Member States have transposed Directive 2000/78/EC and the experience gained in the application thereof. The report stated that the Court of Justice of the European Union had also developed the interpretation of the Directives through its case-law. The main problems were similar to those stated earlier for Poland. They include the definitions of direct and indirect discrimination, harassment, victimisation and the legal standing of the interested organisations.

Undoubtedly, there is a need to popularise the issue and inform the interested persons about their rights and, in particular, that discrimination in employment can also occur at the recruitment stage. It is not surprising that some countries such as Poland initially not fully transposed the directive, and consequently such issues were not solved at all. An additional problem is the issue of wider participation of NGOs, whose aim is to counteract discrimination in employment.

3.2. An evaluation of the effectiveness of legal instruments in Poland and opportunities for improvement

An evaluation of the effectiveness and efficiency of the existing legal solutions in terms of protection against discrimination in employment in Poland can be made on the basis of statistical data obtained from common courts as to the number of cases, the method of their completion and the length of proceedings.

As indicated by data obtained directly from courts, in 2010-2014 the number of cases involving general discrimination in employment, i.e. workplace harassment and mobbing, was fairly constant, except for the year 2011, and remained at about 1,100 cases per year. The vast majority of cases involved the violation of the principle of equal treatment in employment, and also mobbing

Table 1: The number of incoming cases of discrimination in Polish courts in 2010-2014

Type of case	Number of incoming cases				
	2010	2011	2012	2013	2014
Compensation for the breach of the principle of equal treatment in employment	438	790	591	575	683
Compensation due to sexual harassment as a form of discrimination in the workplace	15	51	13	10	11
Compensation and redress due to mobbing	569	507	454	429	425
Discrimination in employment	61	99	102	62	61
Total	1083	1447	1160	1076	1180

Source: Informacja statystyczna p. 7.

Table 2: The number of discrimination claims in Polish courts upheld fully or partially in 2010-2014

Type of case	Claims adjudged fully or partially				
	2010	2011	2012	2013	2014
Compensation for the breach of the principle of equal treatment in employment	44	41	92	72	47
Compensation due to sexual harassment as a form of discrimination in the workplace	2	2	3	0	2
Compensation and redress due to mobbing	43	23	23	29	46
Discrimination in employment	5	5	4	6	8
Total	94	71	122	107	103

Source: Own study based on the data - Informacja statystyczna p. 14-18.

It is crucial to also look at the duration of proceedings. In the years 2010-2014 the average duration of court proceedings in labour law was on average 153 days, calculated according to CEPJ methodology, while proceedings related to broadly defined discrimination in employment lasted 274 days. (Informacja statystyczna, p. 5)

These results indicate that the vast majority of situations involving discrimination in employment were not upheld in court proceedings. This does not mean that in all these matters there was no basis for believing that there had been discrimination against employees. In practice, the problem in such proceedings was, in fact, related to the possibility of proving the existence of facts pointing to discrimination. Most frequently there was no evidence in the form of documents, notes, letters or recordings. The vast majority of evidence in such cases were based on the testimony of witnesses and the plaintiff. The employer's obligation to prove that the activity did not represent discrimination was not sufficient because usually employers deny the occurrence of such events. Such assertions made by the employer are often confirmed by the staff still working for the employer. To avoid the risk of repercussions from the employer, employees generally do not recall the events referred to by the discriminated-against person. There are even situations when the witness blamed the plaintiff for the subsequent problems with the employer.

Most often plaintiffs in cases concerning discrimination in employment are former employees who have lost their job. They are claiming their rights without fear of further negative consequences from the employer. Often they are perceived by former colleagues as people who want to harm the enterprise.

In the light of the foregoing, such an assertion by the plaintiff, in the absence of other evidence, might not be sufficient for the court to establish the occurrence of discrimination. It is not surprising that in such a situation a low number of court cases is upheld fully or partially.

The statistics clearly indicate that the only way to secure workers against discrimination is to implement protection measures at the level of state authorities. It is necessary to fully implement and to clarify the obligations of employers as indicated in art. 94^{2b} of the Labour Code requiring employers to counteract discrimination in employment. Polish companies lack policies protecting workers from discriminatory phenomena. Most often the actions of employers are limited to informing workers of their rights. There is no support system for employees affected by discriminatory action. It would be appropriate to include trade unions, but the problem is their weak functioning in smaller enterprises, which employ the majority of workers in Poland.

4. THE BUSINESS BENEFITS OF EQUAL TREATMENT IN EMPLOYMENT

The matter of the benefits arising from the application of equal treatment in employment has engaged numerous researchers. The results leave no doubts that a properly conducted policy of anti-discrimination in employment and diversity contribute to an increased productivity. Some research "results suggest that companies can also find a competitive advantage through more effective approaches to managing employee diversity and equality." (ARMSTRONG, CLAIRE, p. 992)

This clearly indicates the very strong influence of discrimination in employment on the productivity of employees. "Perceived discrimination is hypothesized to influence employee outcomes above and beyond other work stressors." (Sanchez, J. I., & Brock, P., p. 1)

There are some important arguments for managing employee diversity and equality:

- when companies become more diverse, the cost of a poor integration of employees will increase,
- organisations developing diversity and equality gain in reputation, which result in their acquiring the best personnel,
- the level of creativity significantly increases when there is high level of diversity of perspectives, which characterises the modern approach to management,
- heterogeneity in decision-making and problem-solving groups potentially produces better decisions through a wider range of perspectives,
- the multicultural model of the organisation makes the system less determinant, less standardised, and therefore more fluid, which makes for greater flexibility to react to environmental changes. (Cox Jr., T. H., & Blake, S., p. 47).

The above points to the numerous benefits of a properly conducted policy of non-discrimination and equal treatment in employment. Undoubtedly, the major threats arising from the phenomenon of discrimination in employment are such matters as the exclusion of individuals from important areas of

social life, negative health effects for people discriminated against, reduced employee productivity, and turning to criminal behaviour.

This makes it necessary to further strengthen the instruments of legal protection against discriminatory actions, as well as for organisations to implement a tangible policy to tackle inequality in employment.

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