

GENDER DISCRIMINATION. THE INFLUENCE OF THE COURT OF JUSTICE OF THE EUROPEAN UNION JURISPRUDENCE

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Abstract

Gender discrimination in labor legal relationships implies unlawful acts by employers against the principle of equal treatment, which have forms of inequalities as their direct, or indirect object, and the employees' prejudices as their effect. As a result, employees who find themselves in comparable legal situations in employment relationships will be subject to mechanisms that ultimately involve a process of limiting the use of their fundamental rights and freedoms as regards access to employment, vocational training, promotion and equal working conditions. The prohibition of discrimination facts on gender criterion in labor relations implies the adaptation of the national laws of the Member States to the new provisions of the European normative acts, a transposition process which presupposes the acceptance of the limitations and the recognition of the concepts in the field, when the interpretation of these norms in the legal practice of the domestic courts are increasingly applying the CJEU jurisprudence. The article presents aspects of European and national laws on gender discrimination, the criticism of the lack of regulation, and the analysis of the role of CJEU jurisprudence in the field of employment legal relationships.

Keywords: *discrimination, gender, jurisprudence, labor.*

JEL Classification: K31, K33

1. Legislation applicable to gender discrimination

From the point of view of the primary legislation applicable to gender discrimination, one can see the influence of the normative provisions in the consolidated version of the Treaty on European Union, referring to the non-discrimination provisions of articles 2 and 3 on the mechanisms and actions needed to combat social exclusion³ in employment legal relationship.

On the one hand, these mechanisms for eliminating inequalities are also found in articles 8 and 9 of the consolidated version of the Treaty on the Functioning of the European Union, the normative act on the promotion of equality between men and women, respectively prohibitions on discrimination on protected criteria starting with citizenship, with implicit reporting to gender differences or sexual orientation.

The Charter of Fundamental Rights of the European Union, on the other hand, contains provisions contained in articles 1, 21 and 22 concerning the recognition of human dignity as the fundamental right of the person, with reference to non-discrimination on grounds of sex, gender or sexual orientation, issues that underpin the protection in the field of labor legal relations, including the possibility for Member States to introduce positive measures in support of the underrepresented sex rights.

Similar mechanisms for combating discrimination on gender grounds are also found in the relevant European directives, in particular in the framework of Directive 2002/73/EC⁴ amending Directive 76/207/EEC⁵ and Directive 2006/54/EC⁶.

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³ Cristine M. Bulger, *Fighting gender discrimination in the Chinese workplace*, (Spring 2000), Boston College Third World Law Journal, p. 348.

⁴ Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002 amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, as well as working conditions.

⁵ Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions.

⁶ Directive 2006/54/EC of the European Parliament and of the Council on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation.

As regards Directive 2002/73/EC, the legislative act is based on the provisions of article 141 (3) of the Treaty establishing the European Economic Community, articles 2 and 3 (2) of the EC Treaty and article 6 of the Treaty on European Union, as well as the rights guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Charter of Fundamental Rights of the European Union, the Universal Declaration of Human Rights and the United Nations Convention on the Elimination of All Forms of Discrimination against Women.

The object of the Directive follows the provisions of article 3 which seek to apply the principle of equal treatment both in the case of direct or indirect forms of discrimination on grounds of sex, including in the framework of Directives 2000/43/EC on the implementation of the principle of equal treatment between persons, irrespective of racial or ethnic origin, and 2000/78/EC on the establishment of a general framework for equal treatment in workforce employment and occupation with regard to mechanisms of the access to job positions, in particular as regards the selection, recruitment, promotion, training or remuneration of employees.

Thus, with respect to the principle of equal remuneration for men and women, Directive 75/117/EEC⁷ requires the transfer of protected rights also after the termination of employment relationships with the employer⁸ with regard to legal remedies⁹, Directive 2002/73/EC also containing legal norms on the sexual harassment of employees, in and out of work, as well as on victimization.

In the same sense, on the one hand, the provisions of Directive 2006/54/EC¹⁰ contain norms on access to job offers, promotion, training and working conditions, and non-discrimination is thus not only reportedly implied in the workplace¹¹. On the other hand, the Directive requires that effective, proportionate and dissuasive sanctions to be applied in the event of a breach of law, with the exception of professions predominantly assigned to a given sex, with reference to differences in treatment that fall within the definition of objective, proportionate and determinant professional requirements, both in terms of remuneration¹², maternity¹³, and related aspects of reconciling work and family life¹⁴.

Non-discrimination on grounds of gender is enshrined in national law¹⁵ in the provisions of the Law no.202/2002 on equal opportunities for women as a framework law, as well as the legal norms of the Labor Code¹⁶.

In this respect, Law no.202/2002 requires, by the provisions of article 1 (1), the observance of the principle of equal opportunities and treatment of women and men, namely non-discrimination in relation to protected sex criteria in the employment legal relations. As regards protected forms there are considered direct and indirect discrimination, harassment and sexual harassment, as well as the special case of multiple discrimination resulting from the application of at least two or more protected criteria.

On the one hand, the regulation imposes to the employers the respect of the principle of equal opportunities and treatment in order to eliminate any form of discrimination in the employment legal relationship, but does not limit their right to apply the positive measures of protection of maternity, disadvantaged or related groups to the specific nature of some professional activities.

⁷ Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women.

⁸ Case C-185/97 Coote, Culegere 1998, p. I-5199.

⁹ Case C-180/95, Draehmpaehl, case C-271/91, Marshall.

¹⁰ Directive 2006/54/EC of the European Parliament and of the Council on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation.

¹¹ Truichici Adrian M., Luiza Neagu, *Dreptul muncii – Jurisprudenta Curtii de Justitie a Uniunii Europene*, Universul Juridic Publishing House, Bucharest, 2018.

¹² Case C-262/88, Barber vs. Royal Exchange Assurance Group, Rec. 1990, p. I-1889.

¹³ Case C-7/93, Bestuur van het Algemeen burgerlijk pensioenfonds vs. G. A. Beune, Rec. 1994, p. I-4471.

¹⁴ *Ibidem*.

¹⁵ Muscalu Loredana Manuela, *Discriminarea în relațiile de muncă*, Hamangiu Publishing House, Bucharest, 2015, p.199.

¹⁶ Țiclea Alexandru, *Codul muncii comentat*, 6th edition, updated, Universul Juridic Publishing House, Bucharest, 2015, p. 21.

Non-discrimination relates mainly to equal opportunities in employment relationships, i.e. access to job offers, similar working conditions, remuneration¹⁷, re-qualification or dismissal conditions.

The legal norms in the field of the Labor Code, on the other hand, are found in the provisions of article 5 which impose equal treatment, with reference to prohibitions on direct or indirect forms of discrimination of employees, which have the effect of restricting fundamental rights by the emergence of situations of exclusion, distinction, preference, or restriction on sex or sexual orientation criteria.

2. The legal effects of the norms aimed at guaranteeing the principle of equal treatment of men and women in labor relationships

In the light of the effects of non-discrimination legislation in the field of gender equality, the Report from the Commission to the European Parliament and the Council on the application of Directive 2006/54/EC implementing the principle of equal opportunities and equal treatment of men and women as regards employment (recast), Brussels, 6.12.2013, COM(2013)861 final, contained references to the consolidation of the principle of equal treatment and to the transposition into national legislation of the relevant legislation.

It should be noted that Directive 2006/54/EC required new regulations to the definition of salary¹⁸, social security on the right to retirement¹⁹ of civil servants, access to justice and burden of proof²⁰, prejudice cover, elements subsequently transposed in the national laws of the Member States. Thus, on the one hand, in Czechoslovakia, Denmark, Italy, the UK or Hungary, for transposition it was necessary to introduce specific legislation, unlike the case of France or Poland, where other directives have already been transposed. In Romania, on the other hand, the directive influenced only social security systems, and in Bulgaria those on maternity leave. In the opposite direction, in Belgium, Hungary, Finland, Denmark or the Netherlands, there was no need to transpose the provisions contained in the previous directives.

As regards the definition of salary as a consideration in cash or in nature received by the employer, it has been transposed into the legislations of Belgium, Bulgaria, France, Hungary, Cyprus, Romania and Slovakia, and in Poland there is the rule according to which gender differentiation presupposes the existence of some similar activities. Regarding the relation between remuneration and job classification in the assessment of gender discrimination, the rules are found in Estonia, Hungary, Poland, Finland and Slovakia as constitutional elements, in Denmark in special laws, and in Belgium in collective labor agreements.

Last but not least, transparency in remuneration matters vis-à-vis employees is recognized in Belgium and Finland and imposed on employers in the Czech Republic only by the courts, and in the UK it is forbidden to limit employees' ability to communicate the salary of other employees. All these provisions are complemented by the assessment of the application of the rules in the field in Belgium, Spain and France, verification by remuneration surveys in Finland, statistical data collection in Denmark, as well as written reports on gender non-discrimination in Italy and Hungary.

In Belgium, Bulgaria, France, the United Kingdom, Cyprus or Lithuania, the legal norms were taken only when national laws did not contain direct distinctions between the specific categories of employees, not in Denmark, Estonia, Romania, or Hungary, as there is no direct reference to the principle of equal treatment in Lithuania and Poland.

On the one hand, the principle of equal treatment is the subject of horizontal provisions in Belgium, the Czech Republic, France, Estonia, Italy, Hungary, the Netherlands and the United

¹⁷ Gâlcă C., *Drept comunitar al muncii. Transpunerea în dreptul muncii român*, Roseti Internațional Publishing House, Bucharest, 2012, p. 94.

¹⁸ In accordance with the provisions of article 2 paragraph (1) letter (e).

¹⁹ In accordance with the provisions of article 7 paragraph (2).

²⁰ Pursuant to the provisions of articles 17-19.

Kingdom, unlike in Romania where the non-discrimination framework applies, and the case of gender change was transposed express only in Belgium, the Czech Republic and the UK. On the other hand, in Denmark, Spain and France, equality of treatment also included discrimination based on gender change, and in Hungary, the CJEU jurisprudence was recognized in terms of extending gender change interpretation.

As regards the access of the alleged victims of discrimination in national courts, it is possible to identify the relative ambiguity of the specific rules detailing the concept of equal work, with direct implications on the analysis of the comparable situation of employers, as well as the lack of concise definition of the equal remuneration term, which made the concepts in Switzerland to be interpreted by national courts with competence in the matter.

The limited access of victims of discrimination to specific means of appeal, including in the event of the cessation of the legal relationship leading to the deed, has also been reported to include procedural obstacles, such as lengthy court hearings, deferral of rights or lack of the conditions for access to relevant information relating to the remuneration of all employees of a particular employer and the elements necessary for reversing the burden of proof.

Last but not least, we are considering issues related to the amount of costs associated with such procedures, in particular to the judicial assistance in the matter, differentiated and limited compensation for the prejudices suffered by potential victims and the existence of unequal attributions of national institutions which have gender equality as their object. Conversely, the introduction of appeals by non-discrimination organizations or associations on behalf of victims of claims as well as the considering as null of the legal rules contrary to the principle of equal treatment are factors that can strengthen the protection of employees' rights in the field of employment legal relationships.

3. CJEU jurisprudence regarding gender equality

Given that national legislation contained only limited rules to define the elements needed to identify gender discrimination in employment or vocational training, these gaps were complemented by the jurisprudence of the European Court of Justice, discriminatory conduct being the final judgment is found by the courts of the Member States by the application of national practices. For example, with regard to the application of the case-law of the Court of Justice in the field of discrimination on grounds of sex, it stated that an employer's requirement relating to pregnancy or objectively unjustified pregnancy will be qualified as unequal treatment and will be considered to be an act of direct discrimination, on the basis of gender, except for positive measures relating to safety and health at that job.

In this respect, according to the Council Resolution of 29 June 2000 on the balanced participation of women and men in family and working life, any Member State has the right to introduce special rules for the protection of persons, such as paternity leave, or those related to stimulating access to under-represented sex for recruitment.

With regard to Case C-423/15 instrumented by the CJEU, its object was to introduce a reference for a preliminary decision based on the provisions of article 3 paragraph (1) letter (a) of Directive 2000/78/EC²¹ and article 14 paragraph (1) letter (a) of Directive 2006/54/EC²².

In the present case, the appeal introduced by applicant Nils - Johannes Kratzer, concerned the application of article 267 of the TFEU, namely discrimination on grounds of age and sex, in the case of a dispute with R - V Allgemeine Versicherung AG.

In this context, there were regarded the provisions of articles 1, 3 (1) and 17 of Directive 2000/78/EC, namely articles 1, 14 (1), 18 and 25 of Directive 2006/54/EC sending to the limitation of discrimination against free access to job offers and the guarantee of equality between men and women without any discrimination on grounds of sex.

²¹ Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation.

²² Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation.

The interpretation given by the internal rules of German national law was found in articles 1, 2, 6, 7 and 15 of the General Law on equal treatment of 2006, a normative act on age and gender nondiscrimination in relation to the right of access to the job offer.

In the context of the case, the relevant legislation would be applied to the way in which a job offer was transmitted by the defendant employer, this requiring to the potential applicants to have the university degree and experience relevant to the position of trainee in the legal field. The applicant, having regard to the full fulfillment of the requirements of the job position, filed a complaint with the employer claiming prejudice payment of EUR 14,000 considering to be discriminated on the grounds of age, with the rejection of his application.

The applicant refused the subsequent invitation to an interview transmitted by the defendant, introducing a claim for prejudices to the competent court, and then finding that all the job positions of that employer were occupied only by women applicants, his action also covered discrimination on grounds of sex. In this context, the Federal Labor Court has decided to suspend the case and to refer questions to the CJEU on how to interpret the provisions of article 3 paragraph (1) letter (a) of Directive 2000/78 and article 14 paragraph (1) letter (a) of Directive 2006/54 in the case of an applicant for employment, and whether the status of mere plaintiff used for the purpose of obtaining compensation is not a situation of abuse of law.

The preliminary questions were based on the defense of the defendant employer who objected to the fact that the applicant had in fact submitted his request to occupy the post solely for the purpose of obtaining further compensation, without actually trying to obtain the access to that job position, which did not represent an area covered by the provisions of non-discrimination on grounds of age or sex of Directives 2000/78 and 2006/54. In this respect, it is considered that a person who does not actually wish to occupy a particular job could not subsequently claim the protection of the European provisions in the matter, not having the status of victim within the meaning of the directives, the equal treatment regarding only the employment process.

In this respect, the interpretation requested to the Court was based on the way in which the European rules of non-discrimination were applied, the basis being the limitation of the use of such normative acts for purposes which can be considered as obviously abusive. Supporting this legal situation contrary to the norms of non-discrimination presupposed the proof in these cases of the fact that the domain to be covered by these normative acts was not known, given the attempt to obtain by a potential victim a relative advantage of a material nature, as a result of an artificial behavior considered unrelated to the interest of occupying a certain job position.

The conclusion of the CJEU in relation to the provisions of article 3 paragraph (1) letter (a) of Directive 2000/78 and article 14 paragraph (1) letter (a) of Directive 2006/54 was thus based on the failure of an applicant to a certain item in the definition of the directives on access to employment, which does not indicate a case of discrimination.

4. Conclusions

In relation to gender discrimination, Directive 2006/54/EC²³ is the framework law based in particular on the provisions of article 141 paragraph (3) of the Treaty establishing the European Community and the provisions of articles 21 and 23 of the Charter of Fundamental Rights of the European Union Extending the scope of Directive 2000/78/EC²⁴.

The scope of the Directive covers the areas of access to employment, promotion and training, remuneration, working conditions, social security, which has the effect of creating a general framework for equal treatment. However, although the normative act contains references to the right of Member States to introduce positive measures for the protection of disadvantaged

²³ Directive 2006/54/EC of the European Parliament and of the Council on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation.

²⁴ Directive 2000/78/EC on the creation of a general framework for equal treatment in employment and occupation, combating discrimination on the grounds of religion or belief, disability, age or sexual orientation.

persons or groups, these rules are usually supplemented by interpretations of the CJEU jurisprudence.

The importance of CJEU case-law derives from the direct non-identification of the facts of employers which could constitute breaches of the principle of equal treatment, since normative acts contain references to protected rights such as equal remuneration, pregnancy or maternity treatment, occupational health.

It can be seen that the relevant directive does not contain clear elements for the transposition into Member States' domestic laws of concepts of gender discrimination, which subsequently required the interpretation of the national courts of discrimination by the judgments of the CJEU, although the adoption of the Directive 2006/54/EC was linked to the introduction of additional rules not contained in previous directives in the field, such as the definition of the concept of salary.

Last but not least, some Member States have shown delays in transposing the Directive, sometimes maintaining their own rules, in some cases on the grounds that such rules are similar to those set out in the other Directives, which reflects the inadequacy of the new provisions.

As a result, on the one hand, one can appreciate that, in this respect, the CJEU case law is a key condition in the mechanism of guaranteeing the principle of equal treatment, in relation to the lack of will of some Member States to agree to the application of the new rules or the process of incorporation into their national legislation of seemingly similar norms, but which in reality have a slightly interpretable content such as those referring to gender change.

On the other hand, a regulation considered to be deficient in the Directive may imply not only the recourse to the CJEU's case law but also the need for further supplementing of new non-discrimination directives, thereby eliminating the sometimes subjective interpretation of national courts of the Member States.

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