

CONFLICT OF RIGHTS IN WORKPLACE WITH REGARD TO THE OBSERVANCE OF INTERNATIONAL ANTI-DISCRIMINATION STANDARDS

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Abstract: *The paper explores some rights and obligations in workplace: the rights of an individual worker (employee); the rights of the other workers (employees), as well as the rights and obligations of the employer. It indicates hypotheses where, in the realization of some of his / her rights, the individual worker violates the rights of other workers of the same team, and the employer, whose right and duty is to protect them, does not have stable legal mechanisms to do so.*

Keywords: *Discrimination, harassment, rights, worker, employer, labour law*

1. INTRODUCTION

The introduction of international and European anti-discrimination standards into national law is an important part of the democratic changes in Bulgaria since the early 1990s. First of all, compliance with international instruments to which the Republic of Bulgaria is a party, even when they contradict internal law becomes a constitutionally established imperative norm - Art. 5, para. 4 of the Constitution [1]. Thus, the country has undertaken obligations arising from universal international human rights instruments, the ILO conventions on the prohibition of discrimination, as well as recommendations against racism and intolerance of the Council of Europe and the political criteria for future membership in the European Union [2]. As a result, a Protection Against Discrimination Act was adopted in 2003 [3] and anti-discrimination provisions are included in a number of special laws.

2. THE INTERNATIONAL ANTI-DISCRIMINATION NORMS IN BULGARIAN LEGISLATION

In general, the European Anti-Discrimination Directives contain a list of protected grounds which includes: sex, sexual orientation, disability, age, religion or belief, racial or ethnic origin, color or membership of a national minority, nationality or national origin, gender identity. The list of discriminatory signs under Article 14 of the European Convention on Human Rights (ECHR) is similar: sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status [4], [5]. In addition, the European Court of Human Rights (ECtHR) has also recognized the following characteristics as grounds for protection: paternity, marital status, membership of an organization, military title, parental responsibility for a child outside the country and residence. In general, the approach to justification under EU law, despite certain differences, is substantially similar to that of the ECtHR [6].

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The purpose of international and European anti-discrimination legal acts is to provide every person equality before the law, equality of treatment and opportunities for participation in public life. It is aimed at protecting and providing equal opportunities for the more vulnerable social strata who have been subject to unequal treatment over the past decades and centuries. This is also the aim of the European directives in the field of work which deal with equal pay for women and men in equal or equivalent work, the prohibition of discrimination in the exercise of the right to work, sexual harassment and harassment, based on the sex, protection of pregnant women and nursing mothers, parental leave. In order to achieve this goal - the protection of the more vulnerable social strata - they have also been transposed into the Bulgarian anti-discrimination and labor legislation. For example, within the meaning of Art. 8(3) of Bulgarian Labor Code (LC) [7], the employer undertakes not to carry out or prohibit the act of discrimination against the employees of his enterprise. The fulfillment by the employer of this obligation is also the fulfillment of the obligation to protect the dignity of the employee during the performance of the work relationship - art. 127 (2) LC. It also includes the derivative of this obligation not to commit or to allow acts of discrimination against the employees of the enterprise – art. 8 (3) LC and art. 13 et seq. of the Protection Against Discrimination Act (PADA)- and in particular to take effective measures to prevent discriminatory acts carried out at the workplace by an employee against another employee in the same company and with the same employer. The legal purpose of these provisions is not only to prevent and protect the worker from discriminatory acts committed by the employer, but also prevention and protection against such acts by other workers in the enterprise. The non-fulfillment of this labor obligation by other workers constitutes a violation of the labor discipline and is a ground for disciplinary liability - art. 186 LC, art. 17 PADA [8].

According to Art. 17 PADA, an employer who has received a complaint from an employee who is considered to be a subject of harassment, including sexual harassment, at the workplace, is obliged to immediately carry out an inspection, take measures to stop the harassment and to impose disciplinary liability if the harassment is done by another employee. Art. 5 of the same act orders that the harassment based on the signs under Art. 4 (1) (gender, race, nationality, ethnicity, human genome, citizenship, origin, religion or belief, education, convictions, political affiliation, personal or social status, disability, age, sexual orientation, marital status, property status, or on any other ground established by law or by an international treaty to which the Republic of Bulgaria is a party), sexual harassment, incitement to discrimination, persecution and racial segregation, as well as the building and maintenance of an architectural environment hampering the access to public places of people with disabilities shall be considered discrimination. It is clear from this text that the legislator identifies the terms "harassment" and "discrimination" only when harassment is based on the listed in Art. 4 discriminatory signs. From this it should be logically concluded that the Bulgarian word „мормос“, corresponding to "harassment" in principle understood as an unwanted behavior, consisting of intentional, systematic induction of physical or mental pain from a position of power, is a wider concept than the concept of "discrimination ". In this sense, no less suffering can cause unwanted behavior, manifested in systemic verbal aggression, spreading derogatory rumors, offensive qualifications, etc. in the workplace, concerning a person who does not meet any of the features listed in Article 4 (1) PADA. Consequently, the term "harassment" should not be defined as 'discrimination'.

However, the legal definition contained in § 1, item 1 of the Additional provisions of PADA, defines the term "harassment" as "any unwanted physical, verbal or other conduct on the grounds referred to in Article 4 (1), aimed at, or resulting in, a violation of a person's dignity and the creation of a hostile, offensive or intimidating environment". It follows that systematic

and deliberate unwanted conduct of an employee against another employee, which has the purpose or effect of damaging the dignity of the person, is not harassment, if it is not based on the features under Art.4 (1) PADA. Then, how could the victim of such behavior be protected, if that behavior had the purpose or effect of damaging her dignity, but was not based on discriminatory signs? On what basis could the employer achieve the perpetrator's disciplinary responsibility in order to fulfill his obligation under Art. 127(2) LC - to protect the dignity of the injured employee during the performance of the work relationship?

At the same time, the employer faces a number of legal obstacles that prevent him from imposing a disciplinary punishment. First of all, the actions of those persons systematically undermining the dignity of the other workers, cannot be classified as 'harassment' in the workplace, because they are not based on discriminatory signs. Secondly, there is no text in Bulgarian labor legislation providing for disciplinary punishment for deliberate, systemic, degrading the prestige of other workers actions that are not based on discriminatory signs, i.e. actions that do not correspond to the legal definition of "harassment". Thirdly, disciplinary punishment is imposed for violations of labor discipline, and in order for it to exist, it must first of all be proven that the employee has failed to fulfill his obligations under the employment relationship - for example, to observe working hours. If, however, the persons in question fulfill their obligations under the employment relationship, but nevertheless systematically undermine the dignity of other workers and create a threatening environment for them, the employer may find difficult to find legal grounds for disciplinary punishment.

Next, even if there is sufficient reason to believe that the aggressive conduct of the persons concerned is a violation of labor discipline, the procedure for imposing disciplinary sanctions places additional obstacles on the employer. Pursuant to Art. 194 (1) LC, the penalty must be imposed within certain time limits - two months from the opening or one year from the commission of the violation, otherwise it will not be lawful. The expiration of the time limits extinguishes the possibility of imposing a disciplinary penalty. Before imposing the punishment, the employer is obliged to collect evidence, first of all requesting an explanation from the offender - Art.193 (1) LC. With a view to protect the worker, the imposition of a disciplinary punishment is done by a motivated written order of the employer – Art.195 (1) LC. Receiving the order from the worker is a key element of the disciplinary procedure. Therefore, if it cannot be handed personally, the order is sent by post with registered letter with acknowledgment of receipt - art.195(2) LC. Failure to comply with the disciplinary proceedings leads to cancellation of the order if it is considered in court- Art. 193(2); the law also does not consider the hypothesis where, if the employee cannot be found.

The purpose of the disciplinary proceedings is to protect the worker against unjustified dismissal. It is based on the assumption that the worker is the more vulnerable party in the relationship, but gaps in legislation allow the worker to avoid disciplinary punishment. The most accessible way to do so is to go into continuous leave because of temporary incapacity to work, making unachievable the condition of Art. 194 (1) LC - the disciplinary sanctions shall be imposed not later than 2 months after the violation has been discovered and no later than one year after its commencement.

The imposition of disciplinary punishment becomes more difficult and even impossible if the respondents meet the conditions of protection under Art. 333 LC. The precondition is to give consent or refuse to authorize the dismissal by a competent state or trade union body. Even in the event of a systematic violation of the discipline, leading to disciplinary dismissal, the employer can dismiss only with prior permission of the labor inspectorate. In case of dismissal

of an employee or worker suffering from a disease defined in an ordinance of the Minister of Health [9], before the dismissal the opinion of the Labor-expert medical committee is taken. Disciplinary dismissal of a worker or employee who is a member of a trade union is only possible with the prior consent of a trade union body designated by the decision of the central management of the trade union concerned.

The safeguard procedure under Art. 333 LC correctly provides mechanisms to protect vulnerable categories of workers (employees, mothers of children up to 3 years of age, workers, suffering from certain diseases) from possible arbitrariness of the employer. Probably, the members of the trade union leadership are covered by this procedure for the same reasons - protection against employer arbitrariness. In our view, however, the preliminary protection against dismissal of trade union leaders, special negotiating bodies or representative bodies does not solve, but deepens the problems - above all because some workers who are threatened by disciplinary punishment with their conflicting behavior and systematic violation of labor discipline, purposefully engage themselves in trade union activities, to avoid punishment. In addition, such an approach leads to the politicization of the problem and to the circumvention of its essence, which is to impose a just penalty on workers who, through their systemic and deliberate actions, create a threatening environment for other workers and undermine their dignity. Such workers respond to attempts to seek disciplinary responsibility by presenting themselves as victims of harassment in the workplace.

It could also be considered to revise a part of the provision of Art. 333 (1), item 3 and respectively - of Ordinance № 5 in the part on the preliminary protection of workers suffering from mental illness. There are professions whose social purpose is incompatible with the signs of certain mental illnesses and the workers practicing such professions should require annual review and certification by a psychiatrist. When proving the presence of such a disease, the worker concerned should be offered a re-assignment of more appropriate work.

These considerations outline the framework of a fundamental issue, the importance of which is increasing. This is the half-way and one-sided implementation of international and European anti-discrimination acts, resulting in the violation of the rights of persons who do not conform to discriminatory signs. In the literature on the types of discrimination, this is called "reverse (positive) discrimination" and is considered to be "an acceptable form of discrimination against members of a superior or predominantly social group for the benefit of members of a minority or historically disadvantaged group" [10]. Its goal is to compensate the historically existing inequality. On the other hand, Karl Popper formulates the thesis of the "paradox of tolerance", according to which „unlimited tolerance must lead to the disappearance of tolerance. If we extend unlimited tolerance even to those who are intolerant, if we are not prepared to defend a tolerant society against the onslaught of the intolerant, then the tolerant will be destroyed, and tolerance with them“ [11].

3. CONCLUSION

In the field of labor relations, the unilateral application of international and European anti-discrimination acts leads to a conflict of rights at the workplace. Defining the term "harassment" through discriminatory signs leaves a gap in legislation, which makes it possible for some workers to be victims of aggressive and degrading treatment by other workers without being effectively protected by the employer. In view of this, it is appropriate to make the following proposal *de lege ferenda*: 1 / The legal definition of the term "harassment" contained in the Additional Provisions of PADA is inaccurate and insufficient. The text of Art. 5 is sufficient,

according to which harassment based on the signs under Art. 4 (1), sexual harassment, incitement to discrimination, persecution and racial segregation, as well as the building and maintenance of an architectural environment hampering the access to public places of people with disabilities, shall be considered discrimination. A broader wording of the notion of harassment is needed, not only in terms of psychological harassment in the family, school harassment, or harassment based on discriminatory signs. Perhaps such a wording should be contained in the Criminal Code, and the hypothesis of harassment should lead to criminal liability regardless of where and how it occurs; 2 / To amend the text of Art. 333(1), item 5, 5a, 6 and para. 3 LC, which provide for a protective mechanism against the dismissal of trade union leaders, special negotiating bodies or representative bodies; 3/ to add to the provisions protecting workers suffering from mental illness a text obliging the employer to redirect them to appropriate work compatible with the symptoms of the disease.

The proposals aim not only at filling gaps in the legislation. They are also based on the belief that European and international anti-discrimination acts have already fulfilled their purpose - to compensate historically imposed discriminatory practices. In the modern age, whose civilization is marked by human rights[12], reflections on the meaning of tolerance and non-discrimination lead to questions about their borders. The passage beyond these borders leads to violation of the rights of other individuals and creates new inequalities. The overexposure to these indisputable, fundamental, universal human values more and more distances them from the meaningful workload that led to their validation.

REFERENCES

- [1] *Constitution of the Republic of Bulgaria*. Prom. SG 56/13 Jul. 1991, Amend. SG 78/26 Sep.2006 – Constitutional Court Judgment No 7/2006, SG 12/6 Feb 2007
- [2] see in more detail the list of legal texts in: *Handbook on European non-discrimination law*. (2018) Luxembourg, Publications Office of the European Union, pp.293-294; Vidin, B. (2010) *Zakon za zashtita ot diskriminaciya. Osobenosti na zakona*, Nauchni trudove na Rusenskiya universitet, 2010, tom 49, s. 7, pp.10-11. Original title: Видин, Б. *Закон за защита от дискриминация. Особености на закона*, Научни трудове на Русенския университет, 2010, том 49, с. 7, с. 10-11
- [3] *Protection Against Discrimination Act*. Prom. SG No 86/30. 09. 2003, amended, SG No. 105/29.12.2005, effective 1.01.2006, SG No. 30/11.04.2006, effective 12.07.2006
- [4] Ivanov, A. (Year of publication is not specified) *Evropejskiyat sotsialen model i Bŭlgariya sled 2007 godina*, Ministerstvo na truda i sotsialnata politika, pp. 10-11. Original title: Иванов, А. *Европейският социален модел и България след 2007 година* (Година на публикуване не е посочена), Министерство на труда и социалната политика, с. 10-11.
- [5] *European Convention on Human Rights*. As amended by Protocols Nos. 11 and 14, supplemented by Protocols Nos. 1, 4, 6, 7, 12, 13 and 16. (Year of publication is not specified) , European Court of Human Rights, Council of Europe, Strasbourg.
- [6] *Handbook...*pp. 160-226, p.92
- [7] *Labour Code*. Promulgated, State Gazette No. 26/1.04.1986 and No. 27/4.04.1986, amended, SG No. 85/24.10.2017, SG No. 86/27.10.2017, SG No. 96/1.12.2017, effective 1.01.2018
- [8] See Staiĳkov, I.(2006) *Tormoz na rabotnoto myasto – sŭshthnost, posleditsi i pravna zashtita*. Advokatski pregled, 4-5, pp. 9-19. Original title: Стайков, И. (2006) *Тормоз на работното място – същност, последици и правна защита*, Адвокатски преглед, 4-5, с. 9-19

- [9] *Naredba №5 za bolestite, pri koito rabotnitsite, boleduvashiti ot tyah, imat osobena zakrila съгласно чл. 333, ал. 1 от Кодекса на труда.* Obn. DV, br.33 ot 28 April 1987g. Original title: *Наредба №5 за болестите, при които работниците, боледуващи от тях, имат особена закрила съгласно чл. 333, ал. 1 от Кодекса на труда.* Обн. ДВ, бр.33 от 28 Април 1987г.
- [10] Daniela Simeonva-Korudzhieva. (2017) *Zashtitata ot diskriminatsiya – zakonova reglamentatsiya i protsesualni sredstva za zashtita v sluchai na diskriminatsiya.* Orifinal title: *Даниела Симеонова-Коруджиева. (2017) Защитата от дискриминация – законова регламентация и процесуални средства за защита в случай на дискриминация,* available at: <http://www.law-firm-bg.com/>
- [11] Quoted from: Kuznicki, J. (2017) *On the Paradox of Tolerance.* Available on: <https://www.libertarianism.org/columns/paradox-tolerance>
- [12] Mikhaïlova, M.(2009) *Tsivilizatsiya na pravata na choveka, S.,* UI «Sv. Kl. Okhridski», pp. 209, 211. Original title: *Михайлова, М.(2009) Цивилизация на правата на човека, С., УИ «Св. Кл. Охридски», с. 209, 211.*