

SLOVAK AND GERMAN NON-DISCRIMINATION LAWS IN LABOR RELATIONS

Joanna Rogozinska-Mitrut¹

¹Ph.D., Associate Profesor, Pomeranian University in Słupsk, Poland, e-mail:
joanna.rogozinska-mitrut@apsl.edu.pl

Abstract: The purpose of the article is a comprehensive and contextual description of the principle of discrimination in labor relations in the historical and human rights context, as well as in the reality of the current situation in labor relations, taking into account current and future trends in Slovak and German labor law. Summarizing the considerations, the theses were indicated, which made it possible to formulate de lege ferenda conclusions.

Keywords: discrimination, employees, labor law, employers, equal treatment.

1. Introduction

Labor relations affect many people and companies, and whether they are in the position of employer or employee. We all spend a lot of time at work and want to feel comfortable there, which places high demands on creating appropriate working conditions. If discrimination in labor law begins, it is not uncommon for there to be such disruptions that there is no turning back and one must resort to ending them.

Many studies, books and articles have been written on this subject. However, due to the vastness of the subject and the way in which the phenomenon of discrimination is constantly evolving, I do not believe that the topic has been exhausted. I consider discrimination to be a fairly fundamental and important problem in the context of labor relations, due to the actual impossibility of completely eliminating discriminatory behavior.

However, it is possible to strive for the maximum elimination of such socially undesirable phenomena, both on the part of the employer and on the part of employees in relation to other employees (such as bossing or bullying).

2. Legal regulation of discrimination in the Slovak Republic

As the first foreign regulation, the author of this article chose the regulation of non-discrimination in the Slovak Republic. In view of the fact that the Czech Republic had the same legislation as the Slovak Republic until 1993, it is certainly interesting to compare whether the two countries followed the same or similar path after the division of the federation, or whether Slovakia opted for a completely different system of regulation of the prohibition of discrimination in labor relations. The prohibition of discrimination is set forth in the Labor Code (Act No. 311/2001 Coll.), where Section 1 states that individuals have the right, among other things, to choose employment, protection from arbitrary dismissal in accordance with the principle of equal treatment, that is established for the area of labor relations by a special law (365/2004 Coll. - Law on Equal Treatment in Certain Fields and Protection against Discrimination and on Amending and Supplementing Certain Laws), i.e. anti-discrimination. The anti-discrimination grounds are defined somewhat differently than in the Czech Republic. The anti-discrimination law: they have rights without restriction and discrimination on the basis of gender, marriage, sexual orientation, color, race, age adverse health conditions or disability is prohibited. Further, the Law lists genetic traits, beliefs, religion, political or other views, trade union activities, national or social origin, membership in a national or ethnic group, property, birth or other status [10].

It can be noted that the list is more detailed than in the Czech Republic. The Slovak legislator chose a more detailed list of discriminatory grounds. This legislation has similar parameters to the Czech AntiDZ, but minor differences are what we would still find. In addition to the list of discriminatory grounds, it also contains a regulation that prohibits discrimination against legal entities. This protection applies to unequal treatment against a legal entity under Article 2a(9), Act No. 365/2004 Coll. (hereinafter AntiDzSk), with respect to its members, partners, shareholders, members of bodies, employees, persons acting on behalf of the company, or persons for whose benefit the legal entity acts. To illustrate this, we can imagine a situation in which a legal entity is discriminated against on the basis of race because all of its members are of the same race. Protection in labor relations regardless of the discriminatory reason is also enshrined in this law, including, for example, the treatment of job applicants or

wages. It should also be mentioned that "AntiDzSK also regulates the status of persons with disabilities and obliges employers with disabilities to allow such employees to perform work for the employer, as is clear from Section 7(1), AntiDzSK.

The AntiDzSK also regulates the burden of proof in case of litigation, in Slovakia, the burden of proof is reversed, according to § 11 AntiDzSk[12]:

1. "Proceedings in cases involving violation of the principle of equal treatment shall be initiated on the day of the application of the person who objects that his right has been violated by the violation of the principle (hereinafter referred to as the "applicant"). The applicant should indicate in the application the person to whom he alleges a violation of the principle of equal treatment.
2. The defendant must prove that it has not violated the principle of equal treatment, if the claimant notifies the court of the facts from which the court may reasonably conclude that the principle of equal treatment has been violated. [11]"

The Slovak Republic established, even before the anti-discrimination law came into force, the so-called Slovak National Center for Human Rights and this institution was established by an act of the National Council of the Slovak Republic, Act no.

308/1993 Coll., on the establishment of the Slovak National Center for Human Rights. On the 2004 side, the institution has become an anti-discrimination body and evaluates compliance with the principle of equal treatment, according to AntyDSK. This body monitors and evaluates compliance with human rights, the principle of equal treatment, and also collects statistics and conducts research on xenophobia or racism in Slovakia. At the same time, it seeks to raise awareness of human rights, and can represent parties in disputes over violations of the prohibition against discrimination. Likewise, it provides legal assistance to victims of acts of discrimination and has the right to make inquiries of courts, law enforcement agencies or the prosecutor's office as to whether their human rights are being respected.

In 2020, the Constitutional Court of the Slovak Republic addressed the government's proposal to abolish Section 8(8) of the Anti-Discrimination Act, a provision that allowed the adoption of special compensatory measures to prevent disadvantages based on race or ethnic origin. The government's proposal, however, argued that the provision contradicted Article 1(1) of the Constitution of the Slovak Republic and that it violated the principle of legal certainty due to a lack of clarity about the purpose of these compensatory measures. Another objection said that the conditions under which they could be adopted were not clear for the reason that, who was to adopt these compensatory measures, and that the proposal did not specify how these measures were to be adopted. The Constitutional Court subsequently held a hearing on October

18, 2021, overturned this part of the Anti-DSK, as in its view it was contrary to Article 12 (1) and (2) of the Constitution of the Slovak Republic [¹. This article guarantees equality of rights regardless of faith, religion, race or color, etc. The Constitutional Court of the Slovak Republic justified, among other things, the repeal of Article 8(8) of the AntiDzSk by stating that: "the norm does not contain the aspect of timeliness, a framework definition of the methods of achieving the defined goal, the permissible object of compensatory measures and the criteria The concept of ensuring equal opportunities in practice and compliance with the principle of equal treatment, which should be in accordance with the rule of law, should also include a framework definition of the methods of achieving this goal in a way that does not violate the balance and respect for the rights of other groups of people" [13].

The Constitutional Court of the Slovak Republic further expressed the opinion that this positive measure is not viewed from the point of view that it is a means to achieve substantive equality, but rather as an instrument that in its operation leads to inequality, that is, because it is not formulated as it should be. In addition, the Constitutional Court said that the wording of this positive provision should be such that the provision can be seen as a derogation from the general principle of equality, and must be limited to what is both necessary and proportionate to achieve substantive equality, i.e. through these positive measures. The Constitutional Court also criticized the lack of temporariness of such positive measures in the contested provision.

"The provision of Article 8(8) of the Anti-Discrimination Law is conceived according to the model of the substantive understanding of the principle of equality, which in itself would be consistent with the rule of law (Article 1(1) of the Constitution). In a state governed by law observe in practice equality of opportunity, the principles of equal treatment, as well as the way to secure these principles in real life, including specific compensatory measures to prevent disadvantages perceived as discrimination" [4].

The Slovak Constitutional Court said that the concept of ensuring equality of opportunity, as well as adherence to the principle of equal treatment, was missing from the decision challenged. These measures should, over time, limit those techniques that seek to compensate for disadvantages. In the absence of such terms, these measures may consequently mean that perverse discrimination against people who are not the target of these measures. This measure can therefore only be taken to achieve an objective and should then be limited,

¹ 1) People are free and equal in dignity and rights. Fundamental rights and freedoms are inalienable, not subject to statute of limitations and non-derogable. (2) Fundamental rights and freedoms are guaranteed on the territory of the Slovak Republic to everyone regardless of sex, race, color, language, faith and religion, political or other opinion, national or social origin, membership in a national or ethnic group, property, birth or other status. No one shall be prejudiced, favored or disadvantaged on these grounds.

otherwise it risks violating the principle of equality of arms. The Constitutional Court has therefore annulled this provision, considering that it is not in accordance with the rule of law of the Slovak Republic and that the Constitutional Court must contribute to ensuring legal certainty, which the Constitutional Court believes this provision of the Slovak Court may violate.

The legal regulation of mediation in Slovakia, contained in Act No. 420/2018 Coll., on mediation and supplementing certain acts, expressly provides that it applies to (among other things) disputes arising out of labor relations; the Czech Mediation Act, while does not explicitly mention the issue of labor law disputes, that of course does not preclude it, especially in some individual labor law disputes, the procedure under the Mediation Act can be used to resolve them. The Czech law on mediation contains only one reference to labor law, when in Section 23 (Examination for Mediator) in paragraph 7 it states: "The content of the exam is to verify the professional knowledge and skills necessary to perform the activities of a mediator, i.e. in the field of mediation and other methods of out-of-court dispute resolution, including relevant mediation techniques, basic human rights and freedoms, civil, commercial and labor law, family law, right to protection consumer law, civil procedural law and the basics of psychology and sociology. [Pichrt, 2018, p. 725] "

3. The legal framework for non-discrimination in Germany

The equality of all people in the Federal Republic of Germany is said to be the equivalent of the German Constitution (Grundgesetz or Basic Law) in Article 3(1), stating that all people are equal before the law. In addition, the article also refers in paragraph 2 that men and women are equal. In paragraph 3 of the same article, the German legislature stressed that no one shall be subjected to discrimination on the basis of race, language, place of residence and origin, faith, sex, religious or political views shall not be prejudiced or favored. In the Federal Republic of Germany, one of the key laws prohibiting discrimination is the Allgemeines Gleichbehandlungsgesetz (hereinafter AGG), or the Equal Treatment Act ("Anti-Discrimination Act"). This law already includes the first provision in its text, declares that it is a law that aims to prevent or eliminate discrimination on the basis of race, ethnicity, gender, religion or belief, disability, age or sexual identity. This is an exhaustive list, and the meaning and scope of each area of the prohibition of discrimination is defined and illustrated by case law. This law came into force in Germany in 2006.

According to Article 6 of this law, an employee is considered to be a person who is employed by an employer and those who, due to their economic situation of dependency, as well as employees of professional training and applicants for employment, and those whose employment relationship has already been terminated. The law recognizes both natural and legal persons who employ workers as employers. Where employees are employed by a third party that hires them on behalf of an employer (such as an employment agency), the law also applies to that employment intermediary [14]. In the second provision of the AGG, we find areas where discrimination is prohibited, such as selection criteria and conditions of employment, access to employment and self-employment, career advancement, regardless of the area of activity or occupational status.

"There is also an obligation to comply with the prohibition of discrimination in terms and conditions of employment, including wages and conditions of dismissal, particularly in individual and collective bargaining and measures for the exercise and termination of the employment relationship and for professional advancement, and according to paragraph 3, also access to all forms and levels of vocational guidance, career counseling training, including vocational training, further training and retraining, as well as practical work experience [16]."

Differential treatment to membership and participation in an employers' or employees' union or association whose members belong to a particular occupational group, including the use of the services of such groups, is also prohibited. Section 8, on the other hand, defines disparate treatment on discriminatory grounds of basis under the AGG, so that it is permissible when that basis is a basic and decisive occupational requirement for the type of activity to be performed or the conditions for its performance, provided that the purpose is lawful and the requirement is proportionate.

In the AGG, we also have a distinction between direct and indirect discrimination, namely in Article 3(2), the AGG defines indirect discrimination as behavior where a disadvantage based on an apparently neutral provision, criterion or practice of a specific group or individual, with respect to a characteristic listed above (i.e., gender or religion, etc.). However, indirect discrimination will not be discriminatory if the regulations or practices are substantially justified legitimate purpose, and the means of their application are necessary and proportionate [16].

If it would be direct discrimination, the employee must be in the same or comparable situation of being treated less favorably and on the basis of one of the discriminatory characteristics. With regard to Section 2(1), there is also a direct disadvantage based on sex, in the case of less favorable treatment of a woman as a result of pregnancy or maternity.

Harassment is defined in the law as unwanted conduct that is intended to lower a person's dignity, through intimidation and humiliation or insult. Sexual harassment is unwanted behavior of a sexual nature under this law, including unwanted sexual propositions and requests for sexual propositions, sexual physical contact, comments with sexual content. It is behavior that causes a violation of the dignity of a person's dignity, especially when the environment characterized by intimidation, hostility, humiliation, humiliation or insult [14]. Harassment can take both verbal and non-verbal forms. It can be intimidation, insults, threats or physical assault, and it can be bullying.

The legislature has also regulated the so-called instruction of discrimination, when someone directs a person to act in a way that is disadvantageous or likely to disadvantage an employee for one of the reasons listed in Section 2 of the AGG. In this, it will not then be decided whether discrimination actually took place, it is sufficient that the intention of the acting person is stated. Employers must maintain the principle of equal treatment, even when it comes to employee compensation. Employers should generally observe the principle of equal treatment of all employees and should, in particular, avoid arbitrary and unjustified favoritism toward individual employees. This principle is upheld despite contractual leeway on wages. An employer may favor an employee only in justified cases and with predetermined conditions set by the employer. This may be the case, for example, in the Federal Labor Court (BAG) ruling of February 13, 2022, Case 5 AZR 713/00, which stated that an employee cannot demand the same wage conditions as his predecessor, because the wage was individually agreed upon. An employer may act in accordance with regulations that provide for this, as long as it is a general rule aimed at achieving some goal. In such a case, there is no violation of the general principle of non-discrimination. In the case of discrimination against an employee (potential employee), the employee can sue the employer in a case that the Federal Labor Court ruled on January 23, 2022. According to Section 15 (1) of the AGG, an employer is liable for the damage suffered by an employer who has discriminated against an employee. This does not apply if the employer is not responsible for the breach of duty. And according to Paragraph 2 of the same Paragraph 2, the employee may claim appropriate monetary compensation, which is not property damage [17].

In the case of non-acceptance of employment, the compensation may not exceed three months' salary if the employee had not been hired, even if the choice was not discriminatory. The cited case law states that an employee can claim compensation for non-pecuniary damage, even if it was not caused directly by the employer, but by the recruiter who recruited for the employer [17].

Section 25 of the AGG also provided for the creation of the Federal Anti-Discrimination Agency, which is established within the Federal Ministry of Family, Senior Citizens, Women and Youth. "The agency is a key institution and a major partner in dealing with workplace bullying, although its powers are limited in particular by the Equality Act It provides general counseling to victims of workplace bullying (information on legal claims, interpreting anti-discrimination laws, providing referrals for counseling services), lists the measures needed to prevent discrimination, conducts scientific research and reports to the German Federal Parliament. The Federal Office for the Prevention of Discrimination also offers online forms for documenting and possibly disclosing cases of workplace harassment [Šimečková, Vobořilová, 2019, p.11]."

The office works to build awareness about discrimination in the workplace, helps resolve conflicts, can warn and alert the perpetrator of discrimination that their behavior is against the law, or can provide psychological support to the victim of discriminatory behavior and inform about the possibility of legal action. The office is also tasked with raising awareness of labor relations and making non-discrimination recommendations.

The author of this thesis believes that this agency in the field of non-discrimination very effective, because it deals exclusively with discrimination and can therefore fully focus on the specific problem. Directly applicable to employees is Section 7 of the AGG, which stipulates that employees must not be disadvantaged for any of the reasons listed in Section 1. This also applies if the discriminator merely accepts the existence of the reason listed in Section 1 for the disadvantage. This also applies to collective bargaining agreements [Rogozińska-Mitrut, Białobłocki, 2022].

In the event that the employer has entered into an agreement with the employee or that, such agreement is part of the employment contract and itself or its provisions were in violation of this Act, this provision shall be deemed ineffective. If discrimination occurs, whether on the part of the employer or the employee, it is a breach of contractual obligations. The AGG Act also specifies when discriminatory treatment in reverse may occur, in Sections 9 and 10. According to Section 9, it is permissible if the reason is an essential and decisive occupational factor a requirement for the type of activity to be carried out or the conditions under which it is to be carried out, provided that the requirement is reasonable and that the purpose is lawful. A similar principle underlies the permissible differential treatment on the basis of age (Section 10 of the AGG), which is supplemented by a demonstrative list of cases in which such differential treatment on the basis of age may occur [Ayalon, 2018, p. 59].

The employer is also required to take the necessary measures to protect against discrimination, and should implement this protection through preventive measures. It also states that the employer should strive to ensure that discriminatory behavior in the workplace and to draw attention to the unacceptability of such disadvantages, especially in the context of vocational training and other training. If the employer has trained employees for preventive purposes, i.e. in an appropriate manner, the above requirements are considered to have been met. If employees violate the prohibition of discrimination in Section 7(1), the employer must take appropriate and necessary measures to prevent discrimination, such as warning, implementation, transfer or termination on a case-by-case basis. Also, when employees are injured by third parties in the performance of their work under Section 7(1), the employer must take appropriate and necessary measures to protect employees on a case-by-case basis.

This requirement appears in Section 12(5) of the AGG Law, where the legislature requires the employer to comply with this law and information about the authorities responsible for complaints under this law to be made available to the public in the company or the employer to publish or post in an appropriate manner. The above obligation of the employer is beneficial because it imposes increased requirements on the employer to prevent discrimination, and in particular to strive to prevent discrimination. Similarly, the law imposes an obligation on the employer to compensate compensation when the employer is liable for breach of duty. Subsequently, an employee can claim reasonable monetary compensation, but not non-economic damages. In the case of non-acceptance of employment, the compensation may not exceed three months' salary if the employee would not have been hired, even if the selection would not have discriminated. The employee must make this claim in writing to the employer within two months, but the time limit may be regulated by a collective bargaining agreement and begins to run from the moment the employee learns of the discrimination. An employee can also defend against discrimination by being able to leave his or her job without loss of pay, if this is necessary for his or her protection, in cases where the employer has not agreed to take any action or has taken wholly inadequate measures to prohibit discrimination. This possibility is enshrined in § 14 of the T&Cs. If the employee decides to seek compensation and the employer does not comply, the employee can file an action in the labor court. This action should be brought within three months of the claim in writing. In the case of the same employer, the court in which the first lawsuit was filed will decide the remaining cases. The lawsuits will be referred to this labor court *ex officio* [16].

The lowest instance in Germany is the district court, which has one judge and two so-called honorary judges. This is followed by the labor court, which again has one judge and two

so-called honorary judges. It is followed by the Grand Chamber, composed of three judges and two so-called honorary judges. If a party loses in the district court, it appeals to the provincial court. The Federal Court of Justice decides only in exceptional cases. There are three levels of justice in Germany, the first is the labor court, the second is the National Labor Court and the highest is the Federal Court. The labor courts are staffed by both professional and "honorary" judges, who are convened from among employees and employers. "Labor disputes are usually the result of contracts between employers and employees and are therefore effectively civil law conflicts. However, the labor courts also have jurisdiction over significant disputes in the public service. The establishment of a special jurisdiction in labor cases first in Germany in 1926 to take into account the special importance of working life in industrial society. With the exception of disputes arising from labor relations, such as wages or termination, labor security courts have jurisdiction over co-determination disputes. These range from works council rights to conflicts between unions and employers' associations over collective bargaining and the legality of strikes" [Pöttsch , 2009].

In 2009, the labor court dealt with a lawsuit by an employee who complained of disparate treatment on the grounds of ethnic discrimination (ArbG Stuttgart judgment of April 15, 2010, 17 Ca 8907/09). The applicant applied for a vacancy as an accountant. The applicant was not accepted for the position and the documents she sent with her application for the position. When the applicant reviewed the documents in question, she found that the employer had annotated her resume, which was also attached, with NRD and "Ossi." The term "Ossi," on which the legal dispute is based, may correspond to the "territory" element in the concept of ethnicity (former East Germany/New Federal States), worked in the former GDR before 1988. She filed a lawsuit against her employer seeking compensation on the grounds that she was discriminated against on the basis of ethnicity [Pöttsch, 2009].

The court ultimately ruled that the designation "Ossi" was not discriminatory and that the decision not to hire the applicant was not based on her background, but on her professional characteristics. Related to the concept of law is the prohibition of racial discrimination, and therefore the requirements of § 1 and § 15 of the Collective Bargaining Agreement were not met. According to the court, residents of the former East Germany do not have a different ethnicity from those of West Germans [17]. In a judgment dated March 18, 2019 - 8 AZR 77/09, the applicant alleged that he was not hired as a municipal equality commissioner. The employer was a city with a population of about 53,000. With an announcement dated March 3, 2019, the City announced a competition for the position of Municipal Commissioner. The complainant was rejected as a male participant in the selection process on the basis that only a woman could

hold the position. As a result, the applicant filed a complaint, but the court ruled in favor of the employer on the grounds that the rejection of her application did not constitute gender discrimination. The court found that this reasoned that the restrictions on women were permissible as affirmative action under Section 5 of the AGG [17]. The court further reasoned that the job description above included the duties of communicating with female clients who were of predominantly Muslim background. If the position had been held by a man, the purpose of the position could have been violated, as women of Muslim faith would have been at risk due to their religion could not communicate with a man [17].

4. Summary

As stated in the introduction to this article, the topic of discrimination in labor relations affects a significant portion of the working-age population and may manifest itself among employers, co-workers or subordinates, among others, and may be due to various reasons, such as gender, age, religion or sexual orientation. It may be that a person becomes a victim of discrimination without even realizing it, or is told by those around him that such behavior is in order because it is established by social rule or company policy.

When it comes to discrimination against women, for example, society has certainly made great strides, but it still cannot be said that women have experienced discrimination in labor relations or that the occurrence of such discriminatory behavior is isolated. It is, of course, doubtful whether it will ever be possible to discriminate. as such, it will never be completely eliminated. The goal of legislators, legal theory and practice, but above all of a responsible society and responsible private authorities, is to eliminate as far as possible discriminatory practices and barriers that put certain groups of people at a disadvantage, whether they are women or other groups of workers. It is a matter of recognizing which groups may be at risk of discriminatory behavior, and attempting to provide these groups with regulations that eliminate discriminatory behavior as much as possible.

In the case of women, this is, certainly, an increasingly discussed issue, and the motivation for employers to offer more of them to employees who are parents. In a situation where a parent (male or female) is at the end of parental leave, when he or she has to provide, in addition to work, for the needs of the child, which is understandably time-consuming, this strategy - from the author's point of view - seems to be very beneficial. Employers should be encouraged by the state to provide more part-time work, e.g. by reducing social security and health insurance contributions, etc. One interesting project, among others, is that of the Ministry

of Social Affairs, which has launched an appeal to support care for the youngest children in nurseries with a total allocation for 2021 of about 224 million euros. This measure should help establish additional new nurseries, where parents will be able to bring their children as early as six months of age, so it could become an important aid for parents who want to return to employment.

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