

POLISH AND FRENCH DIFFICULTIES IN PRACTICE AND PROPOSALS FOR CHANGES IN LEGAL PROTECTION IN THE WORKPLACE

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Abstract: in view of the difficulties faced by potential victims of discrimination in order to present evidence of discrimination in the context of civil proceedings and the limitations on the authority and action of the Labor Inspection and Labor Inspection Office in this regard, it would be appropriate to consider the possibility of giving the inspection bodies the power to require a public or private person to present any request for documents or information deemed necessary to determine whether or not, in a particular situation, discrimination has occurred.

Keywords: discriminacja, labor relations, labor supervision, Labor Code.

1. Introduction

Some government agencies have relevant powers to help them identify and sanction discrimination. This chapter will consider the role that various institutions play - or could play - in the area of leveling employment discrimination, with the aim of examining the extent to which they can remove barriers to access to justice for victims of discrimination.

First, the powers of labor inspection and labor inspection bodies were examined. Both institutions have both civil and criminal powers, allowing them to participate in gathering evidence and establishing discrimination in areas covered by labor courts, mainly labor relations and social security. However, we will see that their action in this area is limited by

several factors, on the one hand by the way their powers are defined by law, and on the other by practice. Therefore, it is necessary to consider how to strengthen their powers in this area.

In any case, these two institutions are only competent in matters within the jurisdiction of labor courts. In the area of access to goods and services that are publicly available, the legislature has not strengthened the enforcement of anti-discrimination legislation as a whole not entrusted to an institution comparable to the Labor Inspectorate could, however, play an important role in this regard could play.

Given the limitations on the role that the three aforementioned institutions can play in this area, an additional measure should be considered to counteract the difficulties that victims face in accessing justice, particularly because of the problem of access to evidence. This measure would authorize equality bodies to obtain, under certain conditions, from a public institution or private person to obtain documents deemed necessary deemed necessary to determine whether discrimination exists in a given case.

2. Legal protection for victims of workplace discrimination

At a meeting held in April 2020, Polish statutory representatives of state labor and employment law regulators gave an account of their first experiences with violations of the prohibition of discrimination in the workplace. At the time of the hearing, this new power had been used in only four cases. In two of the four cases, the labor auditor refused to allow an investigation. Based on their experience, representatives of state labor supervisors indicated that some restrictions on the use of the discrimination test were, in their view, excessive and undermined the operability of the directive. Their comments naturally referred to the original Article 18(1) of the Labor Code. As explained below, the draft law reforming the provisions of Article 18(1) of the Labor Code, which will be submitted to the Polish Parliament on January 25, 2022, largely addresses the difficulties raised by members of the Labor Inspectorate.

The author welcomes the legislator's intention to expand the powers of the Labor Inspectorate to carry out discrimination tests so that they are truly effective by addressing the problems identified in problems identified in practice.

As the French Labor Inspectorate points out in its opinion on the preliminary draft reform of this mechanism, given the sensitive nature of conducting the test, it is necessary to surround the exercise of this power with appropriate conditions and safeguards to prevent violations of rights and undesirable effects. However, these conditions should not be so restrictive that it is practically impossible to use the method envisaged by the legislature for

control. The following problematic issues were considered particularly important. It was noted that the French legislature did not provide for such a restriction: The labor inspectorate was authorized from the outset to conduct investigations to determine any deficiencies with regard to French laws prohibiting discrimination at work, regardless of whether it was criminally restricted.

In this regard, the bill currently under discussion provides for the addition of Article 18(2) in the Labor Code, which reads as follows: "Social inspectors responsible for monitoring, among other things, anti-discrimination legislation and its implementing decrees, are also competent to detect and determine acts that are not criminally prohibited by these laws" (Article 6 of the draft law). This new article would clarify that social inspectors are generally authorized to detect and determine violations of anti-discrimination laws, regardless of whether or not they are subject to criminal sanctions.

The author notes, however, that the bill does not amend the first part of Article 18.1.1 of the Labor Code, which states that the power to conduct discrimination tests is granted to social inspectors to "detect and determine violations of the anti-discrimination law and its implementing decrees." The use of the term "violation," which has criminal connotations, even if it is sometimes used in a more general sense, creates ambiguity about the scope of this power: it cannot exclude the possibility that it may be understood by some as limiting the conduct of tests to cases of discrimination punishable under criminal law. However, it is clear from the new Article 18(2) that the draft law wants to introduce into the Labor Code that the legislature wants to provide social inspectors with all investigative powers including under Article 18(1), they can use them to investigate acts prohibited by anti-discrimination laws in order to detect and establish criminal acts.

In addition, the author believes that in order to avoid any ambiguity in this regard, it would be appropriate to replace the term used in the first part of Article 18(1) "violation" with the broader concept of illegality.

There are problems with the conditions imposed in the current text to allow the inspectorate to exercise its power to conduct discriminatory tests. The obligation to use data mining and data matching to show objective evidence of discrimination, even in the case of a credible complaint or report, is problematic. For some forms of discrimination, data mining is simply not possible because there is no database with relevant data: there is, for example, no database listing pregnant or transgender people; there is no database of job applicants. Some databases have not been updated. And if a relevant database exists, the social inspectorate must

identify and access it. Since it does not manage the databases itself, it must convince the institution concerned that it can access them.

The draft reform envisions relaxing the conditions for organizing discrimination tests by allowing them "on objective evidence of discrimination, or as a result of a legitimate complaint or report, or on the basis of the results of data mining and data matching" (Article 2 of the draft law). In other words, the inspectorate would no longer consider both a complaint or report and the results of data mining and matching for the test; one of these elements, or some other type of objective reason for discrimination, would be sufficient.

The author agrees with the direction of this reform. While it is appropriate to condition the exercise of this special power on the identification of objective evidence of discrimination, it is difficult to understand why three types of indications must be present at the same time.

Third, the condition that scrutiny can only use the power to conduct a test "if such findings cannot be made by other means" has become the cause of divergent interpretations in this area by judges who must allow the test. Some judges have a very restrictive interpretation, making it extremely difficult to prove that this condition has been met.

The draft reform seeks to clarify this condition of subsidiarity so that it cannot be an unreasonable obstacle to the exercise of this power amends Article 18(1), § 5(2) [13], indicating that the power to test can only be exercised if the said determinations "taking into account the principle of proportionality cannot be made in any other way" (instead of "it cannot be made in any other way itself") (Article 4 of the draft law).

The author supports this reform proposal. She notes that this new wording would be consistent with the provision's explicit reference to the principle of proportionality in Article 18(1), §5. This would make it clearer that the subsidiarity condition does not mean that the inspectorate must first effectively use its other investigative powers before conducting the test, but must demonstrate that there are compelling and objective reasons for invoking the test.

The author identified two additional areas of concern. She also raised the following points as part of the discussion of the draft reform of Article 18(1) of the Labor Code: in order for a labor inspector to be immune from punishment if he commits an offense that would be necessary to implement the discrimination test, the offense must be "no more serious" than what the detection method is used for. The seriousness of offenses is judged by the penalty the law assigns to them. However, the penalties for forgery under the Criminal Code are higher than those for violations of anti-discrimination laws. Moreover, this condition makes it impossible to extend the scope of this power to extend to discrimination that is not a crime, since in such a case the crimes committed - whether forgery or the public use of a false name - will always be

considered "more serious" than the crimes for which the method is used, since the latter would not be subject to any criminal sanction. This condition, which stems from the law on special investigative methods that police officers can use when investigating certain particularly serious crimes, is clearly unsuited to the area of discrimination. In this case, the law only requires that the crimes committed are "strictly necessary" to exempt officials from punishment. Similarly, an April 4, 2009 order of the Brussels Capital Region, which authorizes regional labor inspectors to conduct discrimination tests, provides for exemption from punishment if they commit "strictly necessary" offenses.

The author states that the draft law reforming the provisions of Article 18(1) of the Labor Code, which is currently under discussion, aims to provide better protection for social inspectors from the risk of prosecution if they commit an offense in the exercise of this special power, removing the removal of the condition that the offense must not be more serious than the offenses for which the investigative method is used (Article 3.2° of the draft). The amended text of Article 18.3 would specify as a condition for this protection only that the offenses must be crimes committed "as part of their mission and with a view to succeeding or ensuring their own safety" are "strictly necessary" and were committed "with the express and prior approval of the labor auditor or prosecutor."

And most importantly, the Labor Inspectorate does not always have people in its service who have the required competence (e.g., to prepare credible resumes) or with the right profile (e.g., age or gender) to conduct discrimination tests. From this perspective, it would be useful to allow the inspectorate to ask third parties to conduct the test. This observation was also taken into account in the draft law that is part of the considerations undertaken as part of this study.

The latter stipulates that the labor inspectorate, as part of its duties under Article 18(1) of the Labor Code [13], "may briefly summon a person who does not belong to the inspection service, if this is clearly necessary for the success of its mission" (Article 5 of the draft law).

The author believes that this reform is important and useful for strengthening the powers of the Labor Inspectorate to carry out discrimination tests more effectively. In this regard, she notes that the new paragraph proposed in the bill explicitly stipulates that the prohibition on incitement applies to third parties cooperating in conducting the test. The explanatory notes to this article of the draft further state that such third parties may perhaps assist the inspection in carrying out its tasks, such as by providing expertise or helping to prepare resumes, but that "third parties may not be sent to companies to conduct situational interview tests." In any case, third parties participating in the test should also enjoy legal protection from possible

prosecution if they commit acts that qualify as criminality in this context. However, this issue is not addressed in the draft law directed.

However, given the hierarchy of norms, this should be regulated in the Labor Code. The author suggests amending Article 18(1) of the Labor Code to ensure that social inspectors can effectively use their power to conduct discriminatory tests, with the exercise of this power subject to appropriate conditions and guarantees. In particular, the reform should include:

- 1) the method can be used to detect any act prohibited by anti-discrimination laws prohibited, regardless of whether the act is punishable,
- 2) the relaxation of the conditions for the use of discriminatory tests is made, in particular, by allowing the social inspectorate to use serious grounds of discrimination to justify the implementation of the test, to be able to identify them in various ways - through complaints or reports, data mining or data matching, or other forms of objective evidence of discrimination,
- 3) the subsidiarity condition has been clarified to avoid the condition being an unreasonable obstacle to the exercise by social inspectors of their authority to develop discrimination tests; the introduction of the principle of proportionality may be a good solution in this regard,
- 4) the protection of social inspectors from the risk of possible prosecution is improved by removing the condition that the protection applies only if the crime committed as a result of the test is not more serious than the crimes for which the detection method is used.

The author also suggests allowing inspectorates to use third parties to assist inspections in conducting proper discrimination tests. The conditions under which such persons can intervene and the obligations imposed on them, including the duty to ensure the confidentiality of social data of a personal nature of which they become aware, should be clarified. Such persons should also be legally protected in the event that, in the performance of their duties, they are led to commit acts that may constitute crimes.

Consequences of the labor inspectorate's finding of deficiencies and the possibility of administrative sanctions.

One of the peculiarities of the Labor Inspectorate's operation is that when it has established a law that is not being observed, the inspectors have the right to decide what action to take. In particular, when they establish offenses, they are not required to make an official report that could lead to judicial prosecution. They may prefer non-judicial remedies when they

deem them more appropriate, such as advising the parties in the case of the most effective way to comply with the law, giving a warning or setting a deadline for the offender to comply with the law.

If the inspector decides to make an official report when misconduct has been established, it is forwarded to the Labor Auditor, who decides whether to prosecute for offenses listed in the Criminal Code is an additional possibility: if the auditor decides not to initiate criminal proceedings, for example, because he believes that a criminal sanction is inappropriate in a given situation, the relevant judicial official may decide, after giving the offender an opportunity to present his defense, to impose an administrative fine. The offender has the right to inspect his file and to be assisted by a lawyer.

The decision to impose an administrative fine must be justified, and the person concerned may appeal the decision to the labor court, in which case the burden of proof is on the administration. However, such a possibility does not currently exist for violations of the anti-discrimination law, as it is not included in the Criminal Code. In his recommendation, the legislator proposes to change this situation so that administrative fines can be imposed for violations of anti-discrimination laws that would not be prosecuted.

The author notes that opening this possibility would contribute to the development of a progressive and proportional system of sanctions for discrimination. He notes that the introduction of the possibility of imposing an administrative fine in cases where the Labor Inspectorate issues an official report of a violation of anti-discrimination laws and the Labor Auditor decides not to initiate criminal proceedings would have the advantage of providing an additional channel for responding to certain facts an appropriate response: under certain circumstances, an administrative fine may be more appropriate than a criminal sanction. He points out that both the French and Polish regions have introduced such a possibility: when their regional Labor Inspectorate finds a violation of a relevant decree or regulation and the Public Prosecutor's Office refrains from acting or fails to take a decision within six months, the relevant administrative body decides to initiate proceedings for an administrative fine.

However, including violations of anti-discrimination laws in the Criminal Code would mean removing the reference to them in the anti-discrimination laws, which would undermine the coherence and completeness of this legislation. The author believes that it is more appropriate, therefore, to include in the anti-discrimination laws themselves the possibility of imposing an administrative sanction in such situations to the imposition of an administrative sanction, noting that this procedure should be subject to the relevant provisions of the Criminal Code. The author suggests that the three anti-discrimination laws should be amended to provide

that when the Labor Inspectorate completes its investigation and sends a report to the Ministry's public prosecutor alleging a violation of one of these laws in labor relations, and the public prosecutor decides not to prosecute, the relevant department may, based on a reasoned decision, impose an administrative fine administered in accordance with the provisions of the Criminal Code.

The amendment recommended above would only cover discrimination, which is a crime. However, the author believes that the possibility of imposing an administrative sanction could also be relevant in response to violations of anti-discrimination law that are not criminal in nature, which have been identified by the Labor Inspectorate. The author stresses that the introduction of administrative sanctions does not imply criminal liability.

Administrative sanctions have the advantage that they can take many forms: they are not only exist in fines [15]. An example that also relates to fundamental rights is that the adjudicatory chamber of the data protection authority, which is an independent administrative body empowered to examine files alleging violations of the fundamental principle of personal data protection alleged, can take various types of decisions if it considers that a violation has occurred: it can, for example, formulate a warning or reprimand, order the adjustment of data processing, order the accreditation of the withdrawal of the certification body, or issue an administrative fine [15].

In the case of an activity subject to approval or authorization, or an organization receiving a grant, the administrative penalty can take the form of revoking approval or granting. In France, the approval of companies offering service vouchers, for example, depends on whether the company agrees to be examined for compliance with anti-discrimination laws. In addition, when the administrative sanction consists of a fine, the amount of the fine is adjusted depending on various factors that the relevant administration may take into account, such as the seriousness of the failure, the degree of responsibility of the individual or legal entity, or its financial basis.

By expanding the range of measures that can be applied following a finding of discriminatory use, the introduction of a system of administrative sanctions would help ensure that responses are proportionate and tailored to the circumstances of each case. It would also be a mitigation of the asymmetry in the application of criminal law to anti-discrimination laws, since these sanctions can be applied to any type of violation of anti-discrimination laws found by the Labor Inspectorate found, regardless of whether or not it is subject to criminal sanctions. In the case of criminal discrimination, however, an administrative sanction can only be imposed if the prosecutor has decided not to prosecute. The procedure leading to the promulgation of

such a sanction by the competent administrative body must, of course, be surrounded by all the required safeguards to protect the rights of the persons concerned. In particular, the independence and impartiality of the officer authorized by law, respect for the right of defense, and the existence of the right to appeal to a court of full jurisdiction must be guaranteed.

The author recommends that the legislature create the possibility of imposing administrative sanctions on labor relations if, after a post-investigation investigation, it finds that the provisions of any of the three anti-discrimination laws have not been met, even if the violation is not criminally restricted. This possibility should be accompanied by guarantees that the rights of the affected individuals will be respected, in accordance with the provisions of the Labor Code.

3. Summary

The reflection arising from the above should focus in particular on how these bodies could exercise such and its relationship to the powers that can be exercised, which they currently have, in particular the power to take legal action. The author notes that the combination of the power to investigate and the power to take legal action are not actions within the same institution is not something unknown in the Polish institutional landscape. On the site, the DPA is empowered to take legal action to enforce basic data protection rules and has an inspection service consisting of sworn inspectors with significant investigative powers: these inspectors can, in particular, interrogate individuals, conduct on-site investigations, inspect computer systems review computer systems and copy data stored therein, electronically access information, seize or seal property or computer systems.

If equality bodies were given the power to demand the production of certain documents, this could be reserved for a specific department within those bodies, consisting of sworn officers. Consideration should also be given to how the coercive nature of this power could be assured. Several options could be considered. Following the example of the establishment of a "Défenseur des droits" in France, the Labor Inspectorates could be given the power to refer a case to a summary judgment judge when the person summoned does not provide the requested information and the summons is ineffective residual. This solution would ensure judicial control over the exercise of this power of guarantee.

In any case, adequate safeguards would need to be put in place to protect the rights of data subjects and third parties. In order to improve access to justice for victims of discrimination, it is necessary for the legislature to consider the possibility of granting equality

to authorities, when there are consistent indications that a public service or a private person is in possession of a document that constitutes evidence of facts relevant to determining whether a situation may constitute discrimination, to require that person to produce the document. In this way, consideration should be given to the desirability of entrusting such a power to equality bodies be entrusted, the conditions for exercising this power, and the role of the judiciary in monitoring its exercise. The exercise of this power should be accompanied by the necessary safeguards to ensure that the rights of all persons concerned are respected.

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